IN THE

Supreme Court of the United States

October Term 1976

No. 76-238

THE NATIONAL FARMERS' ORGANIZATION, INC.
Petitioner,

v.

UNITED STATES OF AMERICA AND ASSOCIATED MILK PRODUCERS, INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CONTENTS

TABLE OF AUTHORITIES

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The National Farmers' Organization, Inc. (hereafter "NFO") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (Appendix A) is reported at 534 F.2d 113. The district court's opinion (Appendix C) is reported at 394 F. Supp. 29.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1976. A petition for rehearing was denied on May 19, 1976. (Appendix B). This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The lower courts denied petitioner's motion, pursuant to Federal Rule of Civil Procedure 24(a)(2), for intervention of right in proceedings for approval of a proposed consent decree terminating a government antitrust suit. The questions presented are:

1. In such proceedings, what standard is to be applied to determine whether an applicant for intervention of right is "adequately represented" by the Government?

   (a) Is Rule 24 to be interpreted in consent decree proceedings to require an applicant for intervention to satisfy a more stringent test of inadequacy of representation than is applied in other types of litigation?

2. Does Rule 24(a)(2) require as a matter of law, as the court of appeals held, nothing less than a conclusive showing by the prospective intervener that the Government acted corruptly in negotiating and accepting the proposed decree?

3. If the Rule does in fact require such a showing, may a hearing and opportunity to explore the Government's good faith be denied to a prospective intervener who has made a preliminary showing that both the defendant and high government officials sought at various stages of the litigation to exert corrupt political influence to obtain a resolution favorable to the defendant, and that the decree as proposed falls short of the relief normally obtained in such cases and to which the Government would have been entitled after trial?

STATUTES AND RULES INVOLVED

Rule 24(a)(2) of the Federal Rules of Civil Procedure and section 2 of the Antitrust Procedures and Penalties Act, Pub. Law 93-528, 88 Stat. 1706 (1974), are set out in Appendices D and E respectively.[1]

STATEMENT OF THE CASE

1. Introductory and Background Facts

The United States instituted this action pursuant to 15 U.S.C. §4 on 1 February 1972 in the Western District of Texas charging the defendant Associated Milk Producers, Inc. (hereafter "AMPI") with having violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

AMPI is the largest milk marketing cooperative in the United States with a membership of approximately 40,000 milk producers located primarily in fourteen midwestern and southwestern states.[2] AMPI was formed in the latter part of 1969 as a result of acquisitions or mergers of some 36 or more previously separate cooperatives.

The Complaint (R. at 10)[3] charged that AMPI, acting both unilaterally and in combination and conspiracy with processors, haulers, and other unidentified co-conspirators, had sought to eliminate competi-

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[1] The Appendices ("App.") to this Petition are paginated consecutively rather than separately. They will be cited hereafter by their individual headings and the place in the Appendix where the cited material appears. *E.g.*, "App. C at 27a."

[2] Wisconsin, Minnesota, South Dakota, Iowa, Nebraska, Illinois, Indiana, Missouri, Kansas, Tennessee, Arkansas, Oklahoma, New Mexico and Texas.

[3] The "R" references are to the "Appendix" filed in the court of appeals.

tion from other milk producers and cooperatives and to monopolize the marketing of milk in its 14 state marketing area. It charged that defendant had coerced milk processors and haulers not to deal with AMPI's competitors, acquired the businesses of any processors and haulers who did deal with such competitors in order thereby to eliminate such dealings, compelled farmers to sign membership agreements that unreasonably restricted their right to withdraw and compete with AMPI, and artificially depressed the prices received by competing producers for their milk. (R. at 17-18). As a result, the Complaint charged, competition between defendant and other cooperatives and producers had been eliminated and AMPI had successfully monopolized the sale of milk in its 14 state marketing area to the point where it controlled a substantial majority of the milk sold throughout the entire area and between 90 and 100% of the milk sold in many of the local markets. (R. at 13, 18-19). The Complaint sought injunctive relief against the violations and practices alleged and "such other further relief as the Court may deem just and proper," but did not seek dissolution or divestiture relief.

Pretrial proceedings were conducted in the Western District of Missouri together with a number of earlier private cases as part of the Midwest Milk Monopolization Litigation, JPML Docket No. 83. In one of these private actions, NFO, the present petitioner, is seeking triple damages and injunctive relief against AMPI and others.[4] NFO is an agricultural association of farmers organized under the laws of Iowa, and milk

[4] Alexander v. NFO, Civil Action No. 19191-1, Western District of Missouri.

marketing is one of the functions it performs for its members. In this capacity, NFO and its members compete directly with AMPI, and they were among the principal targets and victims of the predatory practices and monopolization charged to AMPI in the Government's complaint.

The case was formally transferred to the Western District of Missouri on 20 February 1974 pursuant to 28 U.S.C. § 1404(a). On 13 August 1974, the Government and AMPI submitted a proposed consent decree for the court's approval. NFO thereafter sought to intervene of right under Federal Rule 24(a)(2)[5] for the purpose of opposing entry of the consent decree in the form proposed. (R. at 364-65).

While the proposed decree was pending, the Antitrust Procedures and Penalties Act (hereafter "APPA")[6] became law on 21 December 1974. Section 2 of the Act (App. E hereto) mandated significant reforms in the handling of consent decrees, reforms stemming from Congress's concern about the role played by improper political pressures in the formulation and acceptance of such decrees (as exemplified by the then recent ITT consent decree scandal) and the prevailing practice of the district courts to defer uncritically to the discretion of the Attorney General in accepting such decrees.

Finally, on 30 April 1975, the district court denied NFO's motion to intervene and its request for an evidentiary hearing on its application, held over NFO's objection that there had been substantial compliance

[5] NFO also sought discretionary intervention pursuant to Rule 24(b), but that is not involved here.

[6] Public Law 93-528, 88 Stat. 1706.

with the APPA, and approved and entered the consent judgment. (*See* App. C). In an opinion filed on 16 April 1976, the Court of Appeals for the Eighth Circuit affirmed the district court. The decision of the court of appeals was limited to the intervention issue; the court did not reach the issues sought to be raised by NFO relative to the content of the consent decree and the alleged failure to comply with the requirements of the APPA. (App. A). Subsequently, on May 19, the court denied NFO's petition for a rehearing. (App. B).[7]

2. NFO's Motion to Intervene

A. The Basis for Intervention

Rule 24(a)(2)[8] requires that an intervener of right must have an "interest" in the subject matter of the action, and that his ability to protect that interest "may as a practical matter" be impaired or impeded by disposition of the action. Even then, intervention will be denied if it can be shown that the applicant's interest "is adequately represented by existing parties."

The first two of these elements—interest and practical impairment or impediment—are not at issue. NFO and its members, as targets and victims of the predatory practices which are the subject of the Govern-

[7] The court, while denying the petition, amended its opinion to reflect NFO's contention that high government officials "may have influenced the subsequent consent decree proceedings to ensure that AMPI received only a 'slap on the wrist.' " *See* App. B.

[8] ". . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and . . . the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

ment's action, have a substantial interest in securing full and adequate relief against AMPI's predatory practices, an interest that surely will be impaired or impeded as a practical matter by their inability, in their private action, to obtain significant equitable relief over and above that granted in the Government case.[9] The only issue, and the one on which the lower courts based their decisions, is the "adequacy" of the Government's representation.

Although the wording of Rule 24 ("*unless* the applicant's interest is adequately represented") places the burden upon the existing party to show adequacy, the Government offered no evidence in the district court. NFO, on the other hand, made a substantial and undisputed showing that the representation was not adequate under the circumstances of this case.

To begin with, NFO pointed to overwhelming evidence that AMPI had used political influence and large

[9] Compare the Government's brief in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967): ". . . We grant that California and Edison have an interest in the proceeding which, were it not adequately represented by the United States—would support a claim of intervention of right. That interest is a right of action against El Paso for violation of § 7 [of the Clayton Act]. Edison, as a purchaser of natural gas in the California market, and the State of California, as a representative of such purchasers, have standing to challenge a restraint upon competition in that market. We further grant that the decree entered below, if allowed to stand, would inhibit their ability to assert that interest in a later Section 7 action against El Paso relating to the same violation." Brief for the United States at 57. *See also id.* at 27. The impairment or impediment is even greater in the instant case in view of the decision in *International Tel. & Tel. Corp.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913 (9th Cir. 1975) which, if it accurately states the law, would preclude dissolution or divestiture relief in a private action.

campaign contributions in an effort to dispose of the case, and that the government officials to whom these efforts were directed had reacted sympathetically, to say the least. Second, NFO pointed to the Government's failure to seek structural relief in the form of dissolution or divestiture even though such relief is customary and traditional in monopolization cases such as the instant one. Finally, NFO pointed to the Government's hostile attitude toward enforcement of the provisions of the newly enacted APPA.

NFO urged that these factors, singly and in combination, warranted intervention of right. NFO urged, in the alternative, that it was entitled to an evidentiary hearing at which the matters (principally the question of political influence) could be explored and additional evidence adduced, particularly since all of the relevant evidence was in the exclusive possession of the Government and the defendant, both of whom were opposing intervention.

With respect to the first of these matters, *i.e.*, the alleged wrongdoing, NFO relied largely, although not entirely, upon "The Final Report of the Select Committee on Presidential Campaign Activities, United States Senate," popularly referred to as the "Watergate Report"[10] and identified as Exhibit B in the court of appeals. The story of the enormous financial pledges and contributions by the dairy cooperatives—principally AMPI—to the 1972 political campaign is a familiar one and will not be repeated here.[11] The focus here will be upon the relationship between those pledges

[10] S. Rep. No. 93-981, 93rd Cong., 2d Sess. (1974).

[11] *See, e.g.*, Watergate Report, Chapter 5.

and AMPI's efforts to influence the course and handling of the instant case.

1. On 23 February 1971, the Antitrust Division began an investigation of AMPI's allegedly predatory and monopolistic practices. The investigation was conducted by the Division's Chicago office which eventually concluded that the situation was serious enough to warrant a grand jury. Watergate Report at 699-700. The request of the regional office for authority to convene a grand jury was approved by the then Assistant Attorney General for Antitrust, Richard McLaren, and forwarded for final approval to Attorney General John Mitchell on September 10, the same day TAPE (AMPI's political funding arm) was contributing the final installment of a pledge of $232,500 to the Finance Committee to Re-Elect the President (CRP). *Id.* at 700, 705. One week previously, President Nixon, in fulfillment of a long-standing AMPI political objective, had addressed the AMPI convention in Chicago. *Id.* at 694, 700.

2. After Mitchell received the grand jury request, "White House aids began monitoring the antitrust investigation." *Id.* at 705. On September 24, for example, Charles Colson contacted Haldeman about the investigation, warning him of "very serious adverse consequences" if the investigation "goes too far." *Id.* at 705-706. And on October 6, Gordon Strachan, Haldeman's assistant, received a report from John Dean on the "current activities within the Department of Justice" concerning AMPI. Strachan passed this on to Haldeman to use at a planned meeting with Mitchell. *Id.* at 706, 707.

3. Normally, McLaren's request would have been answered by Mitchell within a week or two. In this case,

however, seven weeks passed with no response. Then, on October 29, McLaren sent Mitchell a second request for authority to convene a grand jury. *Id.* at 700, 705-706. Thereafter, on November 3, Haldeman met with Murray Chotiner, who was then acting as counsel to AMPI, and the following day, Haldeman discussed with Mitchell the antitrust investigation of AMPI, and informed Mitchell "of the connection between the milk producers under investigation and the 'milk money'" contributed to the campaign. *Id.* at 706-707.

4. On November 18, Mitchell discussed the antitrust investigation with Herbert Kalmbach, the President's personal attorney and chief fund-raiser for the re-election campaign. Kalmbach had been closely involved with soliciting and receiving "milk money" prior to and during the investigation, and continued in that capacity for some time after the suit was filed. Mitchell apparently discussed the investigation with Murray Chotiner at or around the same time. *Id.* at 707.

5. Shortly thereafter, on November 30, in a striking departure from Justice Department practice, Mitchell rejected McLaren's request for a grand jury, and directed that the Antitrust Division "go the civil route." *Id.* at 701-702, 707. This eliminated the possibility of any criminal action and restricted the Division to a possible civil suit. It also deprived the Division of the broad investigatory powers of a grand jury, including the power to subpoena testimony, and thereby severely limited and restricted the investigation. *Id.* at 702.

6. The Division ultimately drafted a civil complaint and a memorandum summarizing the supporting

evidence, and McLaren forwarded these to Mitchell sometime between January 18-21, 1972, with a note stressing AMPI's "grossly predatory practices" and strongly urging approval of the suit. *Id.* at 702-703. A few days before, Kalmbach, with Mitchell's approval, had met with AMPI officials in California to discuss the continuation of political contributions by AMPI through 1972. Kalmbach reported to Strachan on the meeting, and the latter reported to Haldeman on January 18 that, as a result of the meeting, the contributions would continue. *Id.* at 708-709.

7. Kalmbach briefed Mitchell on the California meeting on January 21. *Id.* at 710. The next day, Mitchell approved the Antitrust Division's civil complaint, but returned it to McLaren with a note saying: "I suggest that you get these people in before you file." *Id.* at 703. This refers to "prefiling negotiations," which are designed to reach agreement on a decree proposed by the Government before a suit is filed. The procedure ordinarily is employed only if the defendant first agrees in principle to the terms of the relief sought. *Id.* at 703. AMPI had not done so.

8. In compliance with Mitchell's order, a meeting was held between the Division's Chicago office staff and AMPI counsel. *Id.* at 703-704. AMPI, however, was unwilling to agree to the relief sought, and AMPI counsel even indicated an intention to stall the suit until after McLaren's imminent departure from the Antitrust Division to accept a federal judgeship, thus using the "negotiation period to 'block politically' the filing of the suit." AMPI counsel went so far as to refer "to the fact that dairymen were big political contributors." *Id.* at 704.

9. McLaren thereupon instructed the Chicago office to inform AMPI counsel that, if the basic terms of the proposed consent decree[12] were not accepted by January 31, the suit would be filed the following day. When AMPI declined to do so and sought again to stall the suit, the complaint was filed on 1 February 1972, McLaren's last day in office. *Id.* at 704-705. McLaren "felt that AMPI was not engaging in the negotiations in good faith and . . . he wanted to 'preclude any possible attempt by AMPI to resist the filing of the suit by some political means. . . .'" *Id.* at 708.

10. The suit had a temporary "chilling" effect on contributions, and subsequent meetings with government officials to discuss contributions were approached by AMPI officials "in the context of . . . the antitrust suit." *Id.* at 699, 712. Thus, Kalmbach met with AMPI officials on February 3 to discuss both the means of fulfilling the balance of a $1 million pledge, and the complaints of George Mehren, AMPI's general manager, about the antitrust suit that had just been filed. *Id.* at 710, 712-713. Kalmbach was "sympathetic" to Mehren's request for help in disposing of the suit. *Id.* at 723.

11. Then, on March 16, AMPI officials again met with Kalmbach[13] and "came to an agreement that AMPI would pay $300,000 [in political contributions] to Kalmbach, and that as a result of that, the antitrust suit against AMPI would go away." *Id.* at 728. *See*

[12] The terms of that decree have not been revealed. Thus, it is not a matter of record whether, and to what extent, those terms differ from the present decree.

[13] In the interim, Haldeman and Mitchell had met to discuss the milk contributions and Kalmbach's role. *Id.* at 711.

also R. at 108-111. That same day, AMPI officials met with then Secretary of the Treasury Connally to complain about the antitrust suit and to get Connally to "help them in the ongoing settlement of negotiations." Watergate Report at 718. Connally thereupon called Mitchell (now Chairman of CRP) and told him "that the antitrust suit was going to have a 'very damaging effect . . . [p]olitically upon the Republican party.'" Connally suggested that Mitchell "get some people out there [the Middle West] and find out what is going on because we are going to have political trouble if we don't." *Id.* at 718-19. Connally also suggested to Mitchell the possibility of postponing AMPI contributions temporarily, and "slowing down the antitrust suit . . . and, at a later time, reducing it to a wrist slap." *Id.* at 720.

12. AMPI officials again talked to Kalmbach on April 4 about delivery of the $300,000 from the various political trusts to the President's campaign, with the expectation that this would "slow down" the antitrust suit and eventually reduce it to a "wrist slap." *Id.* at 725. By this time, however, the scandal over the ITT consent decree had been fully exposed, and Kalmbach got cold feet and temporarily broke-off the contact. *Id.* at 728. *See also* R. at 111. No more political contributions were made to the President's campaign for several months. Watergate Report at 728-729. In line with the suggestions made by Connally at the March 16th meeting, the contributions were later resumed, with the final installments coming just prior to the election so that they did not become public until after the campaign. *See, e.g., id.* at 732-743.

Two additional instances of political pressures being exerted to influence the settlement of the case, neither

of which was brought to the attention of the Senate Committee,[14] came to light in the instant case. The first was in the Spring of 1972 when AMPI retained a certain Arkansas lawyer who had close contacts with a number of Senators. While the precise scope of the lawyer's activities has not been explored (there having been no hearing in the district court), he admittedly was retained for the purpose of having his Senatorial contacts utilize their influence "in behalf of AMPI in the antitrust suit." R. at 723. A dispute subsequently developed over the attorney's fee, and he threatened to "begin immediately to undo that which was accomplished last spring." R. at 720-721. The General Manager of AMPI thereupon assured the lawyer that the fee would be paid, while simultaneously professing not to understand the reference to "undoing" his earlier accomplishments. R. at 722.

The second incident occurred in 1973 and involved an unusual telephone call from the White House by Mr. Wallace Johnson, the President's Special Assistant for Legislative Affairs, to the Deputy Assistant Attorney General in the Antitrust Division.[15] Mr. Johnson said that he had been introduced to an attorney in the office of Senator McClellan who had spoken of AMPI's interest in disposing of the suit through settlement negotiations. R. at 686-687. Once again, a highly suggestive contact was never explored because

[14] The two instances conceivably are related, although the dates do not jibe. Since the lower courts denied Petitioner an evidentiary hearing on its motion to intervene, the uncertainty was never resolved.

[15] This incident was reported by the Government when the district court, at NFO's urging, requested information on AMPI contacts. *See infra.*

the lower courts denied petitioner a hearing on the motion to intervene.

NFO's showing of inadequate representation encompassed two additional points. One dealt with the terms of the decree; the other with the APPA.

The case against AMPI involved monopolization accomplished largely through predatory mergers and acquisitions, coerced membership, and restrictive membership agreements. The decree, however, left intact the monopolistic combination put together by AMPI; it included no structural relief in the form of dissolution or divestiture even though such relief is traditional and presumptively required in monopolization cases and would have been available to the Government after trial. *See, e.g., United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961).

Admittedly, the complaint did not specifically ask for dissolution or divestiture. But that circumstance is itself unusual and highly suggestive. The record does not reveal—since the lower courts refused NFO a hearing on the representation issue—whether this omission resulted from then Attorney General Mitchell's veto of a possible criminal action and concern by the Antitrust Division staff that even a civil complaint would face formidable opposition if it openly threatened to break-up AMPI.

The situation was even more aggravated with respect to the Government's attitude toward the requirement in § 2(g) of the APPA that a defendant file with the district court, and certify to the truth and completeness thereof:

> . . . a description of any and all written or oral communications by or on behalf of such defendant . . . with any officer or employee of the United States concerning or relevant to such proposal [for consent judgment]. . . .[16]

AMPI, acting reluctantly and pursuant to the court's request, submitted two statements of political contacts to the district court in purported compliance with § 2(g). *See* R. at 673-678, 698-710. NFO objected to the first of these filings, pointing out, *inter alia,* that it did not even list contacts that already were a matter of public record. NFO also urged that the Government had an obligation and duty to provide the court with all of the information in its possession relating to AMPI's contacts. *See* R. at 684-85. The Government, however, took no position on the filing. It maintained this posture until the district court, in response to NFO's urging, made an informal request (the terms of which are not a matter of record) for information about AMPI contacts. The Government then informed the court of several contacts that AMPI had *not* revealed in its filing, including the highly suspect but never explored 1973 inquiry from the President's Special Assistant for Legislative Affairs to a Deputy Assistant Attorney General in the Antitrust Division. The Government's submission, however, was expressly limited to contacts "with Antitrust Division staff," and covered only the period from December 1972. R. at 686-687. No attempt was made to obtain information on contacts with Government officials outside the Division, and the statement did not even cover

[16] Communications by counsel of record, unaccompanied by anyone else, with the Attorney General or employees of the Department of Justice need not be included.

everyone within the Division who had been consulted about the decree. Nor did the Government take any position on the demonstrated inadequacy and incompleteness of AMPI's filing.

After NFO had once again taken issue with both the AMPI filing and the disinterested attitude of the Government (R. at 688-690, 691-697), AMPI, acting pursuant to yet another "informal" request by the court (the terms of which are not a matter of record), made a second filing. R. at 698-710. Once again, the filing made no more than a bow in the direction of complying with § 2(g). As NFO pointed out (R. at 713-718), the filing was limited in time to post-complaint contacts, omitted even post-complaint contacts that had been documented in the Senate Watergate Committee Report and in the record of this case, and merely listed contacts without describing in any detail or with any particularity the substance of the contact (which is, after all, the root of the matter).[17] NFO also continued to take exception to the Government's position that it had no obligation with respect to securing compliance by the defendant with the requirements of § 2(g), this being the sole responsibility of the district court. The court, of course, accepted AMPI's filing even after conceding that they did not include all of AMPI's political contacts and would not "be considered as a model to be used for future cases." App. C. at 29a.

NFO's point with respect to the inadequacy of the representation did not turn upon AMPI's failure to

[17] The filing was not certified even though certification is specifically required by the statute. NFO pointed this out (R. at 717), but AMPI failed to correct the omission, and both the Government and the district court ignored it.

comply with § 2(g), but rather upon the Government's abdication of responsibility to aid the court in enforcement of a statutory provision that was designed primarily to insure the very adequacy of the Government's representation. As we show, *infra,* the Government's ability to advocate implementation of the APPA was hopelessly compromised by its strong opposition to enactment of the major reforms contained in § 2 when the measure was before the Congress.

3. The Substantive Issues Sought to be Raised by NFO as an Intervener

NFO originally sought intervention to raise substantive issues regarding the content of the proposed decree. When the APPA became law, after NFO's motion to intervene had been filed but before the court had ruled on it, the scope of the proposed intervention was broadened to include compliance with the provisions of the Act.

NFO's principal objections to the decree centered on the need for structural relief (*i.e.,* dissolution or divestiture) and reformation of AMPI's membership agreements to provide for the release of members coerced or defrauded into joining. NFO urged that structural relief was the traditional and customary relief in monopolization cases, and was peculiarly appropriate in the instant case where the monopolization was accomplished in large part through a long series of predatory acquisitions and mergers and coerced memberships.[18] To leave AMPI intact, we argued,

[18] *See, e.g.,* pp. 171-93 of the economic analysis of AMPI submitted by the Government in support of the decree and designated "Exhibit A" to the Appendix in the court of appeals.

would perpetuate the monopolistic combination and leave the monopolist with the fruits of his wrongdoing. NFO offered to prove, in this connection, that AMPI and its constituent elements had consistently and flagrantly disregarded the terms of prior consent decrees to which they had assented, thus demonstrating the need for basic structural relief that did not depend for its effectiveness upon AMPI's promises of future good behavior.

We further urged that the problem of coerced and fraudulently induced memberships could be remedied only by permitting AMPI members to withdraw from the organization on 30 days' notice. The proposed decree, on the other hand, provided for a more limited 30-day opt-out period annually. The decree also permitted AMPI to retain in its membership agreements a two-year covenant not to compete applicable to some withdrawing members.

NFO, moreover, offered to make an evidentiary showing in support of the need for structural relief and the suggested revisions in AMPI's membership agreements and the inadequacy of the decree as proposed.

Turning to the APPA, NFO argued, as we already have noted, that AMPI's § 2(g) filings of political contacts were demonstrably incomplete because they did not include all of the contacts relating to the case and failed to describe with any particularity or specificity the substantive content of even those contacts reported. NFO further urged, in this connection, that the Government had an obligation—which it had failed even to recognize let alone discharge—to assist

the court in obtaining from the defendant full compliance with the requirements of § 2(g).[19]

NFO further urged that the court's role was no longer restricted to determining whether the Attorney General had abused his discretion in accepting the decree, and that both the language and legislative history of § 2(e) required that the court make an independent determination that the decree was in the public interest.

4. The Opinions of the Lower Courts

A. The District Court

The district court's opinion of 30 April 1975 goes into great detail with respect to the historical and chronological features of the case, but is largely uninformative and conclusory on the issues presented by NFO's motion to intervene. With respect to the latter, the court did the following:

1. The court held, in reliance upon *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961), that intervention of right required an affirmative showing that the government was guilty of "bad faith or malfeasance" in negotiating and accepting the decree. App. C at 32a-33a. The court further held, without explanation, that NFO had failed to show "that corruption was at work in the formulation of the consent decree proposed in this case." *Id.* at 26a. And finally, again without explanation, the court held that NFO was not entitled to an evidentiary hearing to

[19] Of course, NFO also contended that the decree would have to be rejected by the court if proper § 2(g) filings and related information should show that the decree had in fact been influenced by improper political considerations.

explore the issue of bad faith or malfeasance. *Id.* at 30a.[20] The court also professed not to be influenced in its decision by the right of an intervener to appeal from a decision approving the consent decree, and expressly rejected the notion that intervention would complicate and delay the proceeding. *Id.* at 37a-38a.

2. Turning to the APPA, the court did not even address NFO's contention that the Government has an obligation to assist the court in carrying out the mandate of the Act by insuring a full and complete § 2(g) filing by the defendant. This point was, of course, one of the critical elements of NFO's claim of inadequate representation.

Indeed, the court never really decided whether the APPA applied to the case.[21] It contented itself with concluding that there had been "substantial" or "adequate" compliance with the Act's provisions or with its "aims and objectives." *Id.* at 18a, 21a, 22a n. 6, 30a.

With specific reference to the "description" of political contacts required by § 2(g), the court concluded, again without explanation or analysis, that AMPI's filings were adequate and there was no need for an evidentiary hearing on the issue. *Id.* at 30a. The court so held after expressly conceding that the filings would not "be considered as a model to be used for future cases" (*id.* at 29a), and after having

[20] The second and third of these findings or conclusions actually appear in section III of the opinion which is devoted primarily to compliance with § 2(g) of the APPA.

[21] When NFO brought the Act to the district court's attention, AMPI argued that it applied only to decrees proposed after its passage. *See* R. at 658.

itself originally expressed concern that the decree might be "a last dividend, perhaps, to have been received in light of political contributions," (*id.* at 16a). The court's opinion did not refer to AMPI's failure to describe the substantive content of the various contacts reported. Nor did the opinion address directly AMPI's failure to include all of its contacts relating to the case. The court recognized that the Senate Watergate Committee Report documented contacts not included in AMPI's filings, but apparently felt that their omission was somehow justified by the existence of the independent documentation. *See id.* at 29a. The court did not point to any basis in the statute for this somewhat startling conclusion.[22]

The district court also rejected NFO's position that *all* lobbying contacts relating to the case had to be included in the § 2(g) filing, even those designed to head-off or weaken the case while it was under active consideration prior to the actual filing. *Id.* at 29a-30a. While the opinion is less than clear, the court apparently thought that only those contacts that dealt literally with "the actual negotiation of the pending proposed consent decree" were covered by the Act. *Id.* at 30a. This extremely narrow reading, for which the court offered no justification, is directly contrary to

[22] The court seemed to apply the "bad faith or malfeasance" test to the § 2(g) issues as well. Thus, the court suggested that, unless NFO could show that the decre itself had been corruptly negotiated and accepted by the Government, AMPI's filings were acceptable even though they did not list all of the defendant's political contacts relating to the case. *See* Part III of the court's opinion, App. at 20a-30a. Note, in this connection, that all of the court's discussion of "bad faith or malfeasance" appears in the section of the opinion dealing with § 2(g). Note further that the court never disputed AMPI's failure to list all of its contacts.

the Act's legislative history. For example, Senator Tunney, the author of the bill that ultimately became the APPA, explained when introducing the bill that:

> . . . the provision would require disclosure, for example, of a meeting between a corporate official and a Cabinet officer discussing "antitrust policy" during the pendency of antitrust litigation against that corporation. Hearings on S. 782 and S. 1088 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 93d. Cong., 1st Sess. at 454-455 (1973) (hereafter "Senate Hearings").

The House even strengthened the reporting provisions of § 2(g) "to insure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree. . . ." H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. at 12 (1974) (hereafter "H.Rep.").

The court also rejected NFO's position that § 2(e) of the APPA imposed upon the court a duty to make an independent determination that the proposed decree was in the public interest. Without any extensive analysis of the legislative history, the court concluded that the Act merely codified existing law. *Id.* at 39a. This had been the position urged by the Government. *See, e.g,* R. at 601, 628, 631. Accordingly, the court held that its role was limited to determining whether the Attorney General had "abused his discretion" in accepting the decree. App. C at 41a. And the court emphasized, in this connection, "the broad scope of the Attorney General's discretion" in accepting such decrees. *Id.* at 33a.

The court's position on the effect of § 2(e) is, of course, wholly at odds with the language of the Act

and its legislative history as well. Indeed, the latter makes it clear that Congress disapproved of the scope of review then being exercised by the district courts, and specifically intended that the court make an *independent* review of the decree and determine that it is in the public interest. The Senate Report, for example, refers specifically to the district court's duty to "make an *independent* determination as to whether or not the entry of a proposed consent decree is in the public interest. . . ." S. Rep. No. 93-298, 93d Cong., 1st Sess. at 5(1973) (hereafter "S. Rep.") (emphasis added). In similar vein, the House Report refers to "judicial rubber stamping" of consent decrees as "one of the abuses sought to be remedied" by § 2(e). H. Rep. at 8.[23] Indeed, the Government opposed enactment of the bill precisely because it expanded the judiciary's role and reduced the discretion previously exercised by the Attorney General. *See, e.g.*, Senate Hearings at 92, 99-100, 105; 119 Cong. Rec. at 24601 (1973) (letter of Mr. Thomas E. Kauper). Undaunted by its defeat in the Congress, the Government successfully urged here that the Act had merely codified existing law on the role of the district judge and the scope of the Attorney General's discretion.

4. The court's treatment of the decree (Part VI) is abbreviated and conclusory. For example, where NFO had urged that the decree should provide for some measure of dissolution and divestiture, the court

[23] The same theme of the need to remedy "judicial rubber-stamping" of consent decrees by imposing upon the court the duty to make an independent finding that the decree is in the public interest runs throughout the House's consideration of the bill. *See, e.g.*, 120 Cong. Rec. at 10762, 10764-65 (daily ed. 19 November 1974).

concluded merely that the Government's decision to the contrary "is well within the discretionary power of the Attorney General under existing law." *Id.* at 41a. Where NFO had argued that the decree would, as a practical matter, preclude substantial additional relief in the pending private actions, the court begged the question with the comment that NFO and others could "urge" stronger relief in the private litigation. *Id.* at 40a. And the court did not respond at all to NFO's position that the public interest required more extensive modification of AMPI's membership agreements to correct coerced and fraudulently induced memberships.

Finally, the court held that none of the objections to the decree required the evidentiary hearing sought by NFO. *Id.* at 19a.[24]

B. The Court of Appeals

The decision of the court of appeals was limited to the intervention point.[25] Affirming the denial of intervention, the court did not reach the questions relating to the APPA or the merits of the decree.

[24] This final point appears in part II of the opinion which is primarily an historical recitation.

[25] The court also referred parenthetically to NFO's alleged interest in blocking any consent decree so that NFO could obtain the benefit of a litigated judgment against AMPI which would be prima facie proof of violation in NFO's private action. *See* App. A at 7a n. 3. This comment, which could be directed at practically any intervener, suggests a basic hostility to the very idea of intervention. In any event, NFO never sought to intervene on the basis of such an interest. Its "interest" was that of an injured competitor and target of AMPI's predatory activities.

1. The court first held that *Sam Fox* had established the controlling standard on adequacy of representation:

> . . . "[B]ad faith or malfeasance on the part of the Government" in negotiating and accepting a consent decree must be shown before intervention will be allowed. App. A at 9a.

Where *Sam Fox* had referred merely to a "claim" of bad faith or malfeasance, however, the court of appeals required *proof* of bad faith.

2. The court then held that the district court had been correct in finding that "the government had acted in good faith and was adequately protecting the public interest by accepting the consent decree." *Id.* at 10a. The court so held without explanation and without considering any of the evidence recited *supra* in part 2 of this "Statement". It did so, moreover, even though the district court's finding of "good faith" was limited to the trial staff of the Antitrust Division and did not extend to other government officials. Indeed, the findings did not even cover the trial staff's superiors within the Division who had passed upon the decree or who had been consulted with respect to the litigation. The district court's findings, moreover, were not based upon an evidentiary hearing or, for that matter, upon "evidence" of any kind; they were based solely upon the assurances given by trial counsel.[26]

3. The court of appeals also suggested that the Government had satisfactorily explained its willing-

[26] The court's attitude toward the Government's assertions was in marked contrast to the court's insistence that NFO come forward with conclusive proof of Government wrongdoing and do so, moreover, without having had the opportunity to explore the matter at an evidentiary hearing.

ness to accept a decree without the customary dissolution or divestiture relief on the ground that the peculiar circumstances of the case made such relief unnecessary. *Id.* at 10a.[27] This suggestion, which was made in the context of NFO's claim of inadequate representation, confuses the preliminary issue of adequacy of representation with the substantive issue of approval of the decree. The former relates to intervention and must be resolved before the propriety of the decree is conclusively determined. NFO argued that the decree's abnormality, when viewed in light of the numerous improper attempts to buy a weak and ineffective decree, was a sufficient preliminary showing of inadequate representation to permit NFO to intervene and be heard on the merits. Granting intervention, of course, in no way implies that the intervener will succeed on the merits; the decree might still be approved.[28]

4. The court did not deal with or even refer to any of the APPA issues raised by NFO, even though the claim of inadequate representation was based in part upon the Government's failure to carry out the mandate of the Act. Nor did the court deal with, or refer to, NFO's contention that the showing it had made entitled it, even under the "bad faith" standard,

[27] The court referred to the Government having "offered" proof that dissolution was unnecessary and contrary to the public interest. *Id.* at 10a. As we noted above, the district court refused to hold a hearing on the effectiveness of the decree and the need for the relief sought by NFO even though NFO offered to make an evidentiary showing in support of its position.

[28] Even with respect to the merits of the decree, the issue is not merely whether some rationalization can be offered for not seeking structural relief.

to an evidentiary hearing at which the Government's good faith could be explored.

REASONS FOR GRANTING THE WRIT

1. Government enforcement of the antitrust laws is, for practical purposes, largely a matter of the submission and acceptance of consent decrees. Something in excess of 80% of all Government civil antitrust actions are disposed of this way.

Even this statistic, impressive as it is, understates the importance of the process, because it fails to reflect the impact of consent decrees upon private enforcement actions. As even the Government has reminded this Court, the district courts "would doubtless be reluctant to grant broader relief [in a private action] than that embodied in the final decree in this [Government] case." Brief for the United States at 27, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

These considerations account for the frequency with which the question of intervention arises in consent decree proceedings. Unfortunately, however, the importance of the intervention issue is not reflected in the treatment it has received. This Court has dealt with it only twice in recent times. In both cases, the issue was handled tangentially, and in neither did the Court analyze the matter or provide the lower courts with meaningful directions for its handling.

The cases in question are, of course, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961) and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). In *Sam Fox*, this Court held merely that the attempted intervener had not shown,

as required by Rule 24(a)(2) as it then stood, that it might be "bound" by the consent decree in the res judicata sense. The Court, in a dictum, also expressed its disinclination "to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. . ." 366 U.S. at 689. The intervener in that case, however, had based its claim of inadequate representation entirely upon the alleged failure of the decree adequately to remedy the alleged violations. This claim was identical to the intervener's position on the merits, and could not be sustained without a favorable decision on the latter. In short, the Court's statement was not only a dictum, but, in the context of the case, was addressed primarily to the substantive issue of the scope of the Court's power (as it then stood) to review the merits of the decree.[29] *See, e.g.*, Note, The ITT Dividend, 73 Colum. L. Rev. 594, 610-11 (1973). Indeed, even this predicate of unreviewable discretion is no longer viable since the enactment of the APPA which now charges the district courts to determine *independently* that acceptance of the decree is in the public interest.

Cascade did little to clarify the situation. As Professor Shapiro has pointed out, confusion was the hallmark of the pre-Cascade period, and

> . . . If we look for guidance [on the adequacy of representation issue] to the El Paso decision, we

[29] The Government, of course, had argued that it would be improper for the Court to review the wisdom of the Government's decision to accept the decree since the policy considerations underlying such a determination were not appropriate for judicial review. *See* Brief for the United States at 28, 47, 48.

> come away puzzled, at best. . . . Shapiro, Some Thoughts on Intervention Before Courts, Agencies and Arbitrators, 81 Harv. L. Rev. 721, 741 (1968) (hereafter "Shapiro").

The Court unquestionably held that the Government's representation of Cascade was inadequate within the meaning of Rule 24. *See* 386 U.S. at 136. But the Court never really said why.

Even so, *Cascade* confirms that the *Sam Fox* dictum did not establish any standard of adequacy of representation. Had it done so, Cascade necessarily would have been denied intervention of right since the court made no finding of bad faith or malfeasance, nor did Cascade assert such a claim. *See, e.g.*, Brief of Appellant Cascade Natural Gas Corp. at 40-41.

The district court decisions since *Cascade* are impressive evidence of the resulting confusion.[30] There are, to begin with, cases that interpret the adequacy of representation requirements more or less leniently. For example, in *United States* v. *First National Bank & Trust Co.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co.* v. *United States*, 319 U.S. (1968), the court read *Cascade* as equating "bad judgment" with inadequate representation. *United States* v. *CIBA Corp.* 50 F.R.D. 507 (S.D.N.Y. 1970), on the other hand, held that more than bad judgment was required to show inadequate representation, but firmly rejected the suggestion that a showing of "bad faith and malfeasance" was required. And in *United States* v. *Simmonds Precision Products, Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970), the court apparently thought that *Cascade* eliminated the requirement of inadequate representation; the court upheld intervention solely on the basis of interest and impairment.

[30] With all respect, this Court's practice since *Cascade* of affirming per curiam regardless of the holding below has not helped matters.

There are other cases that are often cited on the point here at issue, but were actually decided on grounds other than the adequacy of the Government's representation.[31] *See, e.g., United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968) (multiple grounds including untimeliness, lack of interest or impairment, lack of merit in substantive claims); *United States* v. *Automobile Mfrs. Ass'n.*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970) (lack of interest); *United States* v. *Western Electric Co.*, 1968 Trade-cases ¶ 72,415 (D.N.J. 1968), *aff'd per curiam sub nom. Clark Walter & Sons, Inc.* v. *United States*, 392 U.S. 659 (1968)) (intervention sought to enforce already closed consent decree);[32] *United States* v. *Atlantic Richfield Co.*, 50 F.R.D. 369 (S.D.N.Y. 1970) (no interest and no impairment).

In short, although adequacy of representation is the overriding intervention issue in consent decree proceedings. there is still nothing even approaching a

[31] *See, e.g.*, Sullivan, Enforcement of Government Antitrust Decrees by Private Parties, 123 U. Pa. L. Rev. 822, 885-86 (1975).

[32] *United States* v. *Paramount Pictures, Inc.*, 333 F. Supp. 1100 (S.D. N.Y. 1971), *aff'd per curiam sub nom. Syufy Enterprises* v. *United States*, 404 U.S. 802 (1971) also involved an application to intervene for the purpose of enforcing a long standing decree when the defendant sought court's approval of a proposed transaction. Intervention was denied on the basis of "the unbroken precedent against intervention in the Paramount cases." 333 F. Supp. at 1102.

workable, authoritative standard by which adequacy can be measured. In light of the indisputable public interest in the role played by consent decrees in the enforcement of the antitrust policies of the nation, we respectfully submit that the matter is ripe for consideration by this Court, which alone can speak to the issue with authority.

2. The significance of the intervention issue and the consequent need for authoritative guidance from this Court is intensified by the enactment of the APPA. Admittedly, the Act does not directly address intervention and adequacy of representation, but it does recognize and strongly support the contribution to be made by private parties to the consent decree process. It provides, for example, for private parties to submit comments relating to the proposed decree, and directs the court to consider the impact of the judgment upon "individuals alleging specific injury from the violations set forth in the complaint." *See* §§ 2(d), (e)(2). And § 2(f)(3) specifically provides that the court may "authorize full or limited participation . . . by interested persons or agencies, including . . . intervention as a party. . . ."

The Act, moreover, was the outgrowth of congressional concern about the very issue that is the subject of this petition—the adequacy of the Government's representation in negotiating consent decrees. The Act was triggered by the scandal over the ITT consent decree and the accompanying revelations of political pressures and corporate contributions.[33] As the Senate Report noted:

> By definition, antitrust violators wield great influence and economic power. They can often bring

[33] The legislative history contains numerous references to the ITT scandal and the consequent need for congressional action. *See, e.g.*, 119 Cong. Rec. 24598, 24605, (1973) (remarks of Mr. Tunney);

> significant pressure to bear on government, and even on the courts, in connection with handling of consent decrees. . . . S. Rep. at 5.

The congressional response to this concern about the adequacy of the Government's representation was threefold. First, the Act expanded the role of the judiciary by requiring the district court to "make an independent determination" that the decree is in the public interest rather than a mere determination that the Attorney General has not abused his discretion. Second, the input from interested private parties was emphasized and expanded. And finally, the defendant was required to reveal all communications with Government officials relating to the action. *See, e.g.*, S. Rep. at 4. As the House Report put it:

> . . . it is imperative that the integrity of and public confidence in procedures relating to settlement via consent decree procedures be assured. . . . H. Rep. at 6.

As we show in point 3 below, the rule of law laid down by the court of appeals requiring an intervener to make a conclusive showing that the Government acted corruptly in accepting the decree can never be met as a practical matter. And, as we have seen, the Government has little interest in promoting the APPA's reforms, and indeed has videnced some hostility to these very reforms in the instant case. Accordingly, if the decision of the court of appeals is allowed to stand, the Act may be largely ignored since no one with an adversary interest will have standing to pursue these matters on appeal. In the instant case,

120 Cong. Rec. 10763 (daily ed. 19 Nov. 1974) (remarks of Ms. Holtzman); 120 Cong. Rec. 20862-63 (daily ed. 9 Dec. 1974) (remarks of Mr. Tunney).

for example, the district court's highly questionable rulings on sections 2(e) and 2(g) are effectively insulated from review since the only parties with standing to pursue them—the Government and AMPI—collaborated to obtain the very rulings that threaten to nullify the Act's major reforms.

That an intervener may, as here, be the only one with an interest in pursuing the APPA issues does not necessarily require the promulgation of a more liberal intervention standard, although it points unmistakably in that direction. It does, however, underscore the importance and necessity of clarifying the standard.

The Government's position in the instant case with respect to the APPA is, we submit, analytically indistinguishable from the Government's position with respect to this Court's mandate in *Cascade*. There, the inadequacy of representation lay in failure to press vigorously for implementation of the mandate. Here, the Government has been derelict in pressing for implementation of the Congressional mandate embodied in the APPA, a dereliction quite in keeping with the Government's opposition to enactment of the measure.

3. The decision of the court of appeals, if allowed to stand, means that nothing less than a conclusive showing by the prospective intervenor that the Government acted corruptly in negotiating and accepting the proposed decree will suffice. With all respect, this is a meaningless standard, the practical effect of which will be to preclude all intervention of right. If one can show corruption actually at work in the formulation and acceptance of the decree, the question of intervention becomes academic. There will be no need to intervene, because the decree will have to be rejected out of hand in

any event—unless, of course, one is prepared to say that a corruptly negotiated decree may be in the public interest.

To put it another way, the court of appeals confused the ultimate issue whether the decree is in the public interest with the preliminary procedural question of the showing required to intervene. Intervention, if it is to be meaningful, obviously cannot be made to turn upon the success of the ultimate claim; something less in the way of a preliminary showing must be recognized as sufficient. The court of appeals purported to find the controlling principle in *Sam Fox,* but as we have seen, the case will not support the burden placed upon it. Indeed, even the court of appeals did not take the dictum in *Sam Fox* about "bad faith or malfeasance" literally; for the court insisted upon *proof* of wrongdoing while *Sam Fox* referred merely to a "claim."

If allowed to stand, the decision of the court of appeals requiring proof that the Government acted corruptly in accepting the decree will toll the death knell of intervention. Such a drastic determination, if it is to be made, should be supported by a reasoned analysis and should come from this Court.

4. If the decision of the court of appeals is allowed to stand, the "adequacy of representation" requirement of Rule 24 will have a meaning in consent decree proceedings entirely different from its meaning in other litigation. In *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), for example, a unanimous Court upheld intervention under Rule 24(a)(2) in a Government action to set aside a union election for alleged

violations of the Labor-Management Reporting and Disclosure Act. The Court pointed out that the prospective intervener was *not* required to make a conclusive showing that the Government's representation was inadequate. It was enough, said the Court, if there was "sufficient doubt" about the issue:

> . . . The requirement of the Rule is satisfied if the applicant shows that representation of his interests "may be" inadequate; *and the burden of making that showing should be treated as minimal.* . . . . *Id.* at 538 n. 10 (emphasis added)

Indeed, even the court below has held, in other circumstances, that doubt about the adequacy of representation is sufficient. *See Kozak* v. *Wells,* 278 F. 2d 104, 110 (8th Cir. 1960).

Similarly, in *Nuesse* v. *Camp,* 385 F.2d 694, 702, 704 (D.C. Cir. 1967), the court held, in accordance with the wording of Rule 24, that the burden was "on those opposing intervention to show the adequacy of the existing representation," and that intervention required only "a serious possibility" that the existing representation might not be adequate. And in *Twentieth Century Fox Film Corp.* v. *Jenkins,* 7 F.R.D. 197, 198 (S.D. N.Y. 1947), the court upheld intervention where there was merely a suggestion of less than vigorous prosecution of the action.

The Government, of course, has long urged that Rule 24 be given a unique interpretation in antitrust cases, and the argument apparently has had considerable impact on the district courts. The courts, however, have not articulated the reasons for such a distinction, and it seems clearly without any legitimate basis. The rule itself draws no such distinction. Moreover, concern

about the consequences of according interested persons the status of parties would seem unfounded in light of the mechanisms available to deal with the problem. For example, intervention would not necessarily make the intervener a party in further proceedings should the decree be rejected, nor would it require the intervener's consent to settlement of the action. As the Advisory Committee Note to the 1966 amendment to Rule 24 points out (39 F.R.D. at 111):

> An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

Professor Shapiro, while making the same point, *see Shapiro, supra,* at 756 n. 157, has also noted the exaggerated nature of the Government's arguments:

> . . . . The argument that if prosecutorial resources are to be intelligently used the government must have full control over how a case is to be litigated, and indeed whether it should be litigated at all, proves too much. A prosecutor must have some discretion on the matter of whether or not to litigate. Once an action is begun, however, the commitment of resources has been made. Moreover, there is a significant difference between the entry of a consent decree, with its direct impact on the parties and its collateral impact on subsequent private litigation, and a government decision to drop the case or not to sue, which leaves interested private persons unaffected. If a decree is to be entered, the court must approve the settlement that is to be embodied in it; in this endeavor, the court is entitled to assistance. *Id.* at 745-6.

Here, as elsewhere, the recently enacted APPA must also be plugged into the equation. While the Act does not confer upon third parties any right to intervene, it unquestionably undercuts any alleged policy against intervention by its recognition of the contribution to be made by interested persons and by its concomitant expansion of the role of the district courts.[34] If a policy against intervention peculiar to antitrust cases ever existed, it must be rethought in light of the APPA.

5. If the rule announced by the court of appeals is to govern intervention despite its practical and logical deficiencies, it is essential that this Court address and clarify the extent to which a prospective intervener is entitled to an evidentiary hearing at which the issue of wrongdoing can be explored and the supporting evidence developed. The critical problem facing the would-be intervener under the lower court's standard is the unavailability of the evidence needed to show wrongdoing. The evidence, by its very nature, is within the exclusive possession of the Government and the defendant, the very parties proposing the decree and opposing intervention. They, of course, have no interest in exploring the matter in any depth. Denied a hearing and the accompanying mechanism for exploring the issue, the intervener is in the impossible situation of having to adduce evidence while being denied the tools required to do so.

Perhaps the mere claim of possible wrongdoing should not be sufficient to trigger a hearing requirement, with all that the term implies. But, where a

[34] Precisely the same arguments had been advanced against judicial scrutiny of the Government's decision to accept a consent decree.

prospective intervener comes forward, as did NFO, with substantial evidence in support of the claim, surely some right of inquiry must be held to attach even though the precise extent of the right—such as the scope of permissible discovery—may well have to be fashioned to fit the particular case. *Cf. United States* v. *Church of Scientology*, 520 F.2d 819, 825 (9th Cir. 1975) (charge of bad faith in issuing IRS summons, "though thin," requires evidentiary hearing followed by additional discovery if appropriate); *Sperandeo* v. *Milk Drivers & Dairy Employees Local*, 334 F.2d 381 (10th Cir. 1964) (discovery permitted upon preliminary showing of possibility of bad faith prosecution by NLRB); *Center on Corporate Responsibility* v. *Shultz*, 368 F. Supp. 863 (D.D.C. 1973) (discovery ordered on basis of preliminary showing of possibility that IRS ruling predicated upon political considerations).[35]

The court of appeals never so much as discussed the hearing issue even though NFO had made as much of a showing as could reasonably be required short of proving actual corruption infecting the proposed decree. Unless this Court reviews the decision of the court of appeals abrogating the hearing requirement, intervention in consent decree cases will become a practical impossibility.

6. There is a final reason why this Court should grant certiorari to review the judgment of the court of appeals, one that is in a sense a synthesis of those already discussed. As this Court has recognized many

[35] *Cf.* McCormick, Evidence at 787 (2d ed. 1972) (burden of proof placed upon party having possession of the relevant evidence). Here, of course, the Government made no showing at all in response to NFO's.

times, the appearance of justice is perhaps equal in importance to the fact of justice. *See, e.g., Offutt* v. *United States,* 348 U.S. 11, 14 (1954). This consideration pervades all of our legal procedures. Indeed, it is a consideration that was explicitly recognized by the Congress in passing the APPA. As the House Committee noted in reporting favorably on the bill:

> . . . your Committee intends to provide affirmative legislative action supporting the fundamental principle restated by the Supreme Court in the 1973 *Civil Service Comm'n* v. *Letter Carriers* decision, "[It] is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent." H. Rep. at 9.[36]

That is the situation that confronts this Court. More is involved than rejection of one disappointed suitor. Should the litigation be permitted to end by agreement between the Government and AMPI without a full airing and appellate review of the objections to the agreement and the role played by "political justice," the appearance of justice will have been dealt a heavy blow.

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[36] *See also* 120 Cong. Rec. 10762 (daily ed. 19 November 1974) (remarks of Mr. McClory) ("To eliminate both the appearance and the occurrence of 'political justice'. . . .")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: 17 August 1976

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 75-1452, 75-1473

No. 75-1452

UNITED STATES OF AMERICA, *Appellee,*

v.

ASSOCIATED MILK PRODUCERS, INC., *Appellee,*

v.

ASSOCIATED RESERVE STANDBY POOL COOPERATIVE, INC.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

No. 75-1473

UNITED STATES OF AMERICA, *Appellee,*

v.

ASSOCIATED MILK PRODUCERS, INC., *Appellee,*

v.

THE NATIONAL FARMERS' ORGANIZATION, *Appellant.*

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 11, 1975

Filed: April 16, 1976

Before GIBSON, Chief Judge, and LAY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

The National Farmers' Organization (NFO) and the Associated Reserve Standby Pool Cooperative, Inc. (ARSPC), have filed separate appeals from denial of their motions to intervene in a civil antitrust suit brought by the United States against the Associated Milk Producers, Inc. (AMPI), *United States* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D.Mo. 1975). We have consolidated these appeals for purposes of this opinion. We affirm the district court's denial of intervention in each case.

AMPI, the defendant in the government case as well as in several private treble-damage suits, is a dairymen's cooperative marketing organization with about 40,000 members in 14 midwestern states. In the government's suit AMPI is charged with monopolization and attempted monopolization of milk marketing.

ARSPC, one of the appellants, is a federation of 17 dairy cooperatives, among which the defendant AMPI is the largest. ARSPC's function is to equalize supplies and prices of milk in all sections of the nation east of the Rocky Mountains by taking options from producers with excess milk and transferring the milk to other areas where supplies are low.

NFO is a nationwide organization of farmers which markets many of the products of its members. It markets milk in competition with AMPI. NFO has a private treble-damage antitrust suit pending against AMPI in which NFO alleges injury from some of the antitrust violations charged in the government suit.

The government's case was filed in February, 1972. After several years of discovery, the government and

AMPI commenced settlement negotiations, and on August 13, 1974, the parties submitted a proposed consent decree to the district court. Thereafter, the district court set up a detailed schedule for submission of questions and objections by third parties such as NFO and ARSPC. The district court directed all interested persons to file appropriate motions in October, 1974, including motions seeking leave to intervene or to appear as *amicus curiae*.

Both NFO and ARSPC filed written objections to the proposed consent decree. NFO then made a timely motion to intervene as of right and opposed the decree on the ground that the relief granted the government was not sufficient to remedy the effects of past illegal conduct by AMPI.[1] ARSPC, on the other hand, entered an appearance as *amicus curiae* only and objected to the proposed

[1] The NFO also urged that the court had failed to comply with the Antitrust Procedures and Penalties Act (APPA), Pub L. 93-528, 88 Stat. 1706 which Congress enacted in December, 1974. The APPA regulates the consent decree approval process with a view to enabling third parties to examine the decree and express their views on whether it serves the public interest. The Act sets out several requirements, among them the § 2(g) requirement that the defendant in a government case file a description of all written and oral communications relevant to the proposed decree which were made by or on behalf of the defendant to any office ror employee of the government, except those between counsel of record and the Justice Department.

Since the district court had not yet approved the decree when the APPA became effective, the court asked the parties and others to brief the question of whether and to what extent the Act would apply to this case. There was considerable difference of opinion on that matter, but the district court determined that in any event there had been substantial compliance with all requirements of the Act except that AMPI had not made the § 2(g) report on communications. The district court ordered AMPI to file such a report. AMPI made two such filings and the Justice Department reported additional conversations. NFO objected that the reports were incomplete and requested an evidentiary hearing to prove, via the Senate Watergate Report, that there were additional communications.

decree. Counsel for ARSPC stated: "[W]e filed intentionally as *amicus* rather than seeking to intervene under Rule 24 because of the posture of the government with respect to our client. . . ." Transcript of Nov. 14, 1974, hearing. Thereafter, ARSPC was allowed to state its objections, propose an alternative version of the challenged provisions, and question the government on why it insisted on the version it did.

On April 30, 1975, the district court approved the proposed decree, finding it to be in the public interest and within the discretion of the Attorney General. In the same opinion, the district court indicated it would deny NFO's motion to intervene. 394 F.Supp. at 42-44.

Twelve days after the district court had approved the decree, ARSPC moved to intervene as of right and to modify the decree in accord with ARSPC's prior objections. The district court denied ARSPC's motion in an unreported memorandum opinion.

THE ARSPC MOTION TO INTERVENE—No. 75-1452.

The district court denied ARSPC's post-judgment motion to intervene as *untimely,* noting that intervention after entry of judgment should be permitted only in rare instances, such as where the applicant was unaware until that time that its interests might be affected. Further, the district court reiterated the statement from its April 30, 1975, opinion that in any event it was satisfied that the government had sound reasons for insisting on its version of the decree rather than ARSPC's version.

TIMELINESS

Rule 24's first requirement is that a motion to intervene be "timely."[2] "Timeliness" under Rule 24 is a

[2] Rule 24 provides, in pertinent part:

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24.

matter committed to the discretion of the trial court, and that court's determination can be reversed only if it is an abuse of discretion. *NAACP* v. *New York,* 413 U.S. 345, 366 (1973); *Iowa State Univ. Research Foundation, Inc.* v. *Honeywell, Inc.,* 459 F.2d 447, 449 (8th Cir. 1972).

The general rule is that motions for intervention made *after* entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner. *See United States* v. *Western Electric Co.,* 1968 Trade Cases ¶ 72,415 (D.N.J.), *aff'd sub nom., Clark Water & Sons, Inc.* v. *United States,* 392 U.S. 659 (1968); *United States* v. *Blue Chip Stamp Co.,* 272 F.Supp. 432, 435-38 (C.D.Cal. 1967), *aff'd sub nom., Thrifty Shoppers Scrip Co.* v. *United States,* 389 U.S. 580 (1968). In these government antitrust suits intervention was denied where the motions were filed after final approval of a consent decree. In *Blue Chip,* the situation was much like that at bar, for the would-be intervenors had previously participated as *amicus.* The court said:

> Each petitioner claims it demonstrated its opposition to the decree by filing an *amicus curiae* brief and by arguing in opposition to its entry. However, if

> petitioners had time to make known their opposition to the decree, they had time to file their applications to intervene.

272 F.Supp. at 435-36.

In the instant case, ARSPC has not advanced sufficient reasons for refusing to move for intervention in October, when the district court requested such motions, and for waiting until the following May, after the decree was filed, to make its motion. ARSPC was at all relevant times aware that the decree contained the provision to which it objects. Further the district court stated that ARSPC never had any reason to believe that the court would refuse to approve the provision or that the government would change its mind.

The district court did not rely solely on the fact that the decree had already been entered in finding the motion untimely. It considered the opportunity of ARSPC to make its motion earlier, the excuse advanced for failing to do so and the opportunities ARSPC had already had to present its objections in written questions, to negotiate with AMPI and the government, and to take part in hearings before the court. On the basis of these factors, the district court held the motion untimely. We agree.

The NFO Motion to Intervene—No. 75-1473

NFO claims that it was entitled to intervene as of right. It is not disputed that NFO's motion to intervene was timely. However, the district court held that NFO had failed to satisfy the other reuisites of Fed. R. Civ. P. 24(a)(2).

NFO urges that the government is not adequately representing either the general public interest or the more specific interests of injured competitors in this suit, due to AMPI's alleged "political muscle" and illegal campaign contributions.[3] NFO asserts that it is a competitor of AMPI and has suffered due to AMPI's predatory practices. It asks that it be allowed to intervene to protect the public interest.

In denying NFO intervention, the district court relied primarily on the Supreme Court's decision in *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961), which, under an earlier version of Rule 24(a), held that private parties were not entitled to intervene in government antitrust suits, since such parties would not be bound by the judgment and could bring their own suits for treble damages. 366 U.S. at 689. While the present Rule 24 no longer requires that an applicant for intervention be bound by the judgment, the district court held that the appropriate standard for intervention in government antitrust cases is still that suggested by the Court in *Sam Fox:*

> [S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment

[3] A second interest which NFO has, though it does not so state, is an interest in blocking *any* consent decree in this case, thus forcing the government to go to trial. The consent decree, of course, is the equivalent of a *nolo contendere* plea and is inadmissible in other suits involving the same alleged antitrust violations, while a litigated judgment against AMPI in the government suit would be admissible in private actions as *prima facie* proof of liability. The cases unanimously hold that a private litigant's desire for that *prima facie* effect is not an interest entitling a private litigant to intervene in a government antitrust case. *See United States* v. *National Bank & Trust Co.,* 319 F.Supp. 930, 933 (E.D.Pa. 1970); *United States* v. *Atlantic Richfield Co.* 50 F.R.D. 369, 372 (S.D.N.Y. 1970), *aff'd sub nom., Bartlett* v. *United States,* 401 U.S. 986 (1971); *United States* v. *Automobile Mfgr's Ass'n,* 307 F.Supp. 617, 619-21 (C.D.Cal. 1969), *aff'd,* 397 U.S. 248 (1970); *United States* v. *Blue Chip Stamp Co.,* 272 F.Supp. 432, 438 (C.D.Cal. 1967). Further, in the analogous context of SEC enforcement proceedings, victims of the alleged fraud are not permitted to intervene in the SEC suit rather than file private actions merely because intervention would be less expensive. *SEC* v. *Everest Mgt. Corp.,* 475 F.2d 1236 (2nd Cir. 1972).

> in negotiating and accepting the . . . consent decree, *at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.*

366 U.S. at 689 (emphasis added).

NFO contends, however, that it need not show bad faith as under *Sam Fox,* and that mere failure to obtain all the relief which might be merited may be grounds for intervention and for setting aside a consent decree. NFO argues that only "nonfeasance" rather than "malfeasance" must be shown. This contention is based on NFO's reading of the Supreme Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Gas Co.,* 386 U.S. 129 (1967).

In that litigation, the government sued El Paso to upset its merger with Pacific Northwest Pipeline Corporation. The district court did not require divestiture on the original hearing, but on appeal the Supreme Court ordered "divestiture without delay." *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964). On remand, the district court held protracted hearings on the proposed decree, but denied petitions to intervene filed by the State of California and by several large users and distributors of natural gas who were to be customers of the new company to be formed by divestiture. The district court finally approved a decree negotiated by the government and El Paso.

On the second appeal, the Supreme Court found the decree wholly inadequate under that Court's prior mandate. The Court held that the petitioners should have been granted intervention to see that meaningful divestiture would occur.

As Mr. Justice Stewart pointed out in his dissent in *Cascade,* the majority opinion can be read to broaden

greatly the persons entitled to intervene in government anitrust suits. 386 U.S. at 147-49. However, most post-*Cascade* cases have confined the case to its rather unique factual situation.[4] Certainly, the fact that the government had persuaded the district court to accept a decree which violated a prior Supreme Court mandate, plus the government's virtual abandonment of the relief originally requested, was a sufficient showing that the public interest was not being adequately represented in *Cascade.*

It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. Thus, in our view, the intervention standard remains that which was stated in *Sam Fox:* "[B]ad faith or malfeasance on the part of the Government" in negotiating and accepting a consent decree must be shown before intervention will be allowed. 366 U.S. at 689.

NFO does not question the integrity and good faith of the Justice Department trial staff who participated in the hearings on the consent decree in the district court. NFO does contend that unnamed high government officials may have influenced the subsequent consent decree proceedings to insure that AMPI received only a "slap on the wrist." The malfeasance or nonfeasance with which NFO is concerned goes back to the commencement of the case. NFO alleges, apparently, that AMPI influenced then Attorney General John Mitchell and his subordinates not to seek

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[4] For cases holding that *Cascade* is *sui generis,* and not to be read as an open invitation to intervention in government suits, *see, e.g., United States* v. *Paramount Pictures, Inc.,* 14 F.R.Serv. 2d 1390, 1391 (S.D.N.Y. 1971), *aff'd sub nom., Syufy Enterprises* v. *United States,* 404 U.S. 802 (1972) (denying intervention in proceedings under consent decree to applicant who alleged government neglect of public interest); *United States* v. *Ciba Corp.,* 50 F.R.D. 507 (S.D.N.Y. 1970); *United States* v. *Blue Chip Stamp Co.,* 272 F.Supp. 432, 438-39 (C.D.Cal. 1967).

the relief which NFO wants the government to demand, specifically dissolution of AMPI or divestiture of certain processing plants and reformation of the membership contracts so that all dairy farmers in a region could resign *en masse*.

The record shows that NFO was allowed to submit voluminous information on these points and to question the government attorneys regarding the requested relief. The district court carefully considered the evidence and found that the government had acted in good faith and was adequately protecting the public interest by accepting the consent decree. 394 F.Supp. at 35-44.

We hold that the district court's decision on this issue is correct. First, this is not a case where the government has requested broad relief at the outset, represented to the court that nothing less would do, and then abruptly "knuckled under" as in *Cascade*. Second, the district court found that the government had good reason not to seek dissolution or divestiture of AMPI even though this is a monopoly case. AMPI's exemption under the Capper-Volstead Act[5] allows the joining together of dairy farmers for "processing, preparing for market, handling, and marketing" so long as they refrain from certain predatory practices. *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960). Thus, it was merely certain practices, and not the concert of action *per se* which the government sought to end. In addition, the government offered proof that not only was dissolution unnecessary, but that it would actually be contrary to the public interest. As for the membership contracts, the decree does require changes which will make it easier for members to withdraw from AMPI.[6]

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[5] 7 U.S.C. § 291.

[6] Under the decree, all AMPI members could quit in at most one year. The decree limits membership contracts to one year and sets cancellation periods to counter automatic renewals. It requires notice to all AMPI members of contract termination dates and methods of withdrawal for each of the next three years. Further, to make withdrawal economically feasible, it requires AMPI to continue handling the milk of a member who has withdrawn on the same basis as for members in good standing for four months after withdrawal. 394 F.Supp. at 53.

The district court also considered whether the NFO should be granted permissive intervention under Rule 24(b). The NFO does have claims and defenses in its private suit that are common to those raised in the government case. Since, however, the district court decided to approve the consent decree rather than force the case to trial, no savings of time in the private suit would accrue from allowing NFO to participate fully as a party in the government's suit. Further, the district court found that the NFO did not want to pursue the common questions of law or fact in the government case but other matters which the court assessed as "either uncontroverted or clearly irrelevant," which would require lengthy evidentiary hearings. 394 F.Supp. at 34. Thus, we conclude that the denial of permissive intervention was not an abuse of discretion and cannot be disturbed by this court.

The respective orders of the district court denying leave to intervene do not constitute abuse of discretion and are AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1975

75-1452

UNITED STATES OF AMERICA, ET AL., *Appellees,*
vs.
ASSOCIATED RESERVE STANDBY POOL COOPERATIVE, INC., *Appellant.*

75-1473

UNITED STATES OF AMERICA, ET AL., *Appellees,*
vs.
THE NATIONAL FARMERS' ORGANIZATION, *Appellant.*

Appeals from the United States District Court
for the Western District of Missouri

Petition of appellant for rehearing filed in cause No. 75-1473 having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

On the Court's own motion the opinion filed in these cases on April 16, 1976 is amended as follows:

On page 9, bottom paragraph, delete the first sentence, "In this case, NFO admits that the negotiation and acceptance of the decree were done *in good faith* by the government lawyers" and substitute the following in its place:

> NFO does not question the integrity and good faith of the Justice Department trial staff who participated in the hearings on the consent decree in the district court. NFO does contend that unnamed high government officials may have influenced the subsequent consent decree proceedings to insure htat AMPI received only a "slap on the wrist."

May 19, 1976

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 74 CV 80-W-1

UNITED STATES OF AMERICA, *Plaintiff,*
vs.
ASSOCIATED MILK PRODUCERS, INC., *Defendant.*

(FILED APRIL 30, 1975)

Memorandum and Order

I.

This antitrust case was initially filed on February 1, 1972 in the Western District of Texas as a civil action under circumstances stated in the affidavit filed January 3, 1974 by the Honorable Richard W. McLaren, presently a United States District Judge, who at the time this case was filed, was the Assistant Attorney General of the United States in charge of the Antitrust Division of the Department of Justice. Pretrial proceedings in this case were, through the cooperation of the Honorable Dorwin W. Suttle, Judge of the Western District of Texas, conducted from the outset by this Court and coordinated with the group of earlier filed private antitrust treble-damage cases which eventually were transferred to this Court pursuant to 28 U.S.C. § 1407 as the *Midwest Milk Monopolization Litigation*, JPML Docket No. 83.

This case was formally transferred to this Court on February 20, 1974, pursuant to 28 U.S.C. § 1404(a) and was given a priority designation, together with several of the private cases originally filed in the Southern District of Texas for early trial. Various pretrial orders anticipated that trial of this case would have commenced in January, 1975.

On August 13, 1974, the parties filed a stipulation under which a proposed consent decree was presented to this Court for approval. Procedures directed by the Court and followed by the parties in connection with the proposed consent decree, the complexity of that proposed decree, the passage and approval of the Antitrust Procedures and Penalties Act, P.L. 93-528; 88 Stat. 1706; U.S.Code Congressional and Administrative News, 93rd Cong., 2nd Sess., p. 6666, on December 21, 1974, and a recent grand jury investigation of AMPI in the Western District of Texas, have all delayed the processing of the proposed consent decree.

The details of those events and the procedures followed by this Court will be stated in the next part of this opinion. We find and conclude that the procedures directed before and after the approval of the Antitrust Procedures and Penalties Act reflect a substantial compliance with the provisions of that new legislation; that various motions to intervene should be denied; that the proposed consent decree, as the same has been amended during the processing of this proceeding should be approved; and that a supplemental order establishing enforcement and modification procedures should be entered by this Court on its own motion.

II.

The proposed decree was presented under a stipulation which provided that the parties consented that a Final Judgment be entered in the form attached to the stipulation after the expiration of sixty days without further notice to any party or other proceedings, provided the government had not withdrawn its consent within the sixty day period. The press release reproduced in the footnote was issued the same day by the Department of Justice in Washington.[1]

[1] The press release stated in its entirety:

FOR IMMEDIATE RELEASE
TUESDAY, AUGUST 13, 1974

The Department of Justice filed a proposed consent decree today that would terminate a civil antitrust suit against the nation's largest milk cooperative, Associated Milk Producers, Inc., (AMPI) of San Antonio, Texas.

Attorney General William B. Saxbe said the proposed judgment, which will become final in 60 days upon approval by the Court, was filed in U.S. District Court in Kansas City, Missouri.

AMPI has about 37,000 farmer members in 14 states—Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Texas and Wisconsin.

The suit filed February 1, 1972 charged AMPI with conspiracy to restrain and attempt to monopolize trade in the production and the sale of milk.

Assistant Attorney General Thomas E. Kauper, in charge of the Antitrust Division, said the complaint alleged that the AMPI had engaged in activities designed to coerce farmers to join the cooperative.

These included actions intended to depress prices paid to non-members and to foreclose markets to them, he said.

All of the anticompetitive activities identified in the complaint are enjoined by the proposed decree.

The relief contained in the judgment will insure that non-members—and former members—have the opportunity to market milk in free and open competition with the AMPI and will effectively prevent AMPI from coercing non-members to join, Mr. Kauper said.

Comments to the Department of Justice and the Court rearding the proposed judgment are invited from members of the public, during the 60 day waiting period prior to the judgment becoming final.

Mr. Kauper said the usual 30-day waiting period was doubled because of the complexity of the decree and the large number of interested parties.

The procedures followed purported to be in compliance with 28 C.F.R. § 50.1(b), except the Assistant Attorney General in charge of the Antitrust Division stated in the press release that "the usual 30-day waiting period was doubled because of the complexity of the decree and the large numbers of interested parties." No supporting data

whatsoever was presented to support the conclusory statements of the press release in regard to the scope and effect of the proposed consent decree.

The transcript of the proceedings for September 3, 1974, shows that this Court indicated its dissatisfaction with the manner in which the proposed consent decree had been presented. Extensive reference was made to the Hearings conductd on S. 782 before the Subcommittee of the Senate Judiciary Committee. We made clear in September, 1974 that this Court would insist upon "procedures consistent with full illumination in an orderly manner so that the charge cannot be legitimately made that any consent decree in this case is somehow a dividend, last dividend perhaps, to have been received in light of political contributions which the parties like to talk about in this case" [Ibid, p. 28].

We directed at that conference a "reappraisal on the part of the government and AMPI and a suggested time schedule where an explanation of what this decree means and an explanation of what this decree means and an explanation of what it does not mean may be promptly filed where persons who may object, once they find out what the decree is designed to do and what it is designed not to do will be afforded an appropriate opportunity to state in writing their objections, if any, or their suggestion for clarification which they may deem appropriate under the circumstances." [Ibid, pp. 28-29]

After full discussion of the problems presented, and after an off-the-record recess, the Court established a timetable and schedule for the various procedural steps to be taken before this Court would determine whether or not the proposed consent decree would be approved.[2] The matter was set for further hearing for November 6, 1974, in order that

[2] Those steps are set forth, together with detailed explanations, on pages 71 to 102 of the transcript of proceedings of September 3, 1974.

the various filings contemplated by the directions made at the September 3, 1974 hearing could be given appropriate consideration.[3]

Consistent with the schedule, as amended, the government on October 11, 1974 filed a 99 page response to all comments which had been earlier filed by various third persons relating to the proposed consent decree. Eight of the numerous parties to JPML Docket No. 83 had earlier made filings in which they made both general and specific comments on the proposed consent decree. In addition, seven persons not parties to JPML Docket No. 83 had earlier filed comments in accordance with established time schedules.

The government's detailed response treated specifically all issues raised by all persons as they related to the various provisions in the proposed consent decree. That response stated in detail the reasons why the government concluded that the litigation should be terminated in accordance with the proposed consent decree.

The table of contents to the government's response, attached hereto as Appendix A, reveals the scope and careful detail of that response and affords the factual basis for our finding and legal conclusion that such response, when considered in light of all other filings in this case, reflects an

[3] Our memorandum and order of October 3, 1974 modified the time schedule pursuant to a joint request from the government and AMPI under which the time for filing the initial government-AMPI response was extended until October 10, 1974. The time for third persons to file formal objections and other appropriate pleadings, together with legal briefs on the scope of the Court's power to review the proposed consent decree was extended until October 28, 1974; the time for the government-AMPI response to third party objections and pleadings was extended until November 11, 1974; and the hearing, initially set for November 4, 1974, was continued until November 14, 1974.

adequate compliance with the subsequently enacted provisions of the Antitrust Procedures and Penalties Act, as provided in § 2(b), requiring the filing of a competitive impact statement; and § 2(c), requiring a summary of the terms of the proposal for the consent judgment, and as an appropriate response to comments made by interested third persons, as presently required by § 2(d).[4]

Prior to the hearing on November 14, 1974, and in addition to objections and suggestions in regard to the proposed consent decree, formal motions to intervene were filed by NFO; Schepps Dairy, Inc., and Sentry Foods States. The government filed suggestions in opposition to the motions to intervene the day before the November 14, 1974 hearing.

The transcript of the proceedings held November 14 and 15, 1974, shows that the Court deferred ruling on the motions to intervene and directed proceedings to determine whether it was either necessary or appropriate to hear the live testimony of any particular witness which any person wished to call. At the close of the second day of the November 14, 1974 hearing, the Court granted all persons an opportunity to prepare, serve, and file an appropriate statement which would outline the testimonial evidence which they believed should be adduced, together with a summary statement of the testimony that would be elicited from that witness. The Court also required that the statement include an identification of any documentary evidence which counsel believed the Court should consider before ruling the question of whether the proposed consent decree should be

[4] AMPI filed a response on October 17, 1974. No particular attention need be focused on the AMPI response. For AMPI made clear at the November 14, 1974 hearing that its response was written simply for the purpose of supplying supplemental information and was not intended to contradict or to take issue with anything stated in the government's response (see page 104 of the transcript of November 14, 1974 proceeding.)

approved. [See page 141 of the transcript of proceedings of November 14, 1974 hearing.]

NFO, Schepps Dairy, Inc., ARSCP and NAMR filed timely statements of evidence which they believed should be adduced by the Court considering the proposed consent decree. We have carefully considered those statements and find and conclude that the data which all parties wished to introduce in evidence was either uncontroverted or clearly irrelevant and immaterial to any issue before the Court. NFO's statement of evidence, for example, focused upon NFO's concern about the provisions of the proposed consent decree as it related to membership agreements relief afforded an AMPI member; other alleged deficiencies in the proposed consent decree which had been earlier stated in pages 9-14 of NFO's earlier filed objections; NFO's contention that the Final Report of the Senate Watergate Committee required a "plenary evidentiary hearing amounting to a full trial;" that the decree should contain appropriate provisions which would require divestiture relief; relief against harassing litigation, and relief against political slush funds which would enjoin AMPI from operating or controlling TAPE, C-TAPE, or their progeny.

NFO's statement of evidence identified particular depositions and documents already available for the Court's consideration. We also already had available for consideration the Final Report of the Senate Watergate Committee, the Wright report and exhibits relating to that report, which had been produced by Mr. Wright at his deposition. We are satisfied that we have much more data before us for consideration than that contemplated by the Antitrust Procedures and Penalties Act. We find and conclude that a plenary evidentiary hearing is neither necessary nor appropriate under the circumstances.[5]

[5] Section 2(f) of the Antitrust Procedures and Penalties Act, in our judgment, merely codified the existing discretionary power

The Court required the government to give all interested persons the names of the economists who had worked for the government in connection with this case. The government's letter to all liaison counsel in JPML Docket No. 83 shows that the Assistant Attorney General in charge of the Antitrust Division had, at this Court's request, authorized the release of an economic analysis of AMPI which had been prepared for the Department of Justice by Dr. Robert T. Masson, Philip Eisenstat, and David Roddy. That analysis is literally three inches thick and was made available to anyone who wished to see a copy. It has, of course, been carefully reviewed by this Court.

III.

This Court commenced what it anticipated would be its final study of the massive data produced pursuant to the procedures above outlined during the first week of December, 1974. Shortly after December 9, 1974, however, we received copies of the Congressional Record which reflected the unanticipated legislative procedures which resulted in the early enactment of S.B. 782 on December 17, 1974. We promptly addressed a letter to counsel for the government and counsel for AMPI, with copies to all persons who had indicated an interest in the proposed consent decree, requesting their views in regard to whether, assuming Presidential approval, the enactment of the Antitrust Procedures and Penalties Act could be said to be retrospectively applicable to the extent of nullifying all of the procedural

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of a court to take such testimony as it may deem necessary and to authorize full or limited participation in proceedings before the Court in a manner which would serve the public interest as the Court may deem appropriate. In the exercise of discretion recognized in § 2(f), we find and conclude that to direct further proceedings in order to obtain the benefit of further comment by any interested person, including but not limited to directing further plenary hearings, would not be either appropriate or in the public interest under the circumstances of this case.

steps theretofore taken in regard to the proposed consent decree. We directed attention to the general presumption that a newly enacted law should be construed to operate prospectively, as stated in *Hassett* v. *Welch,* 303 U.S. 303, 314 (1938) but recognized that the general rule was not without exceptions, particularly in regard to a statute regulating procedures. We suggested that the question be squarely faced and determined that further action in regard to the proposed consent decree be deferred until such question was resolved.

On January 17, 1975, the government, in principal reliance upon *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696, 711 (1973), stated its view that the Antitrust Procedures and Penalties Act applied only to the extent necessary to carry out the policies of the new Act and that further directions under the circumstances of this case needed to be considered only to the extent that the new Act imposed significant new duties. The government suggested, and we agree, that the aims and objectives of §§ 2(b), 2(c) and 2(d) were adequately fulfilled by the procedures initially directed and that republication and refiling of various documents under the rubric of a "Competitive Impact Statement" would serve no useful purpose. The government suggested, and we agree, that the new requirements of § 2(g) must be satisfied. For that was the only requirement which this Court did not anticipate before the enactment of the new legislation.

On January 23, 1975 AMPI filed a memorandum in which it stated its views that the proposed consent decree was not in any way subject to the Antitrust Procedures and Penalties Act. AMPI, however, stated that it had no objection to filing a statement of contacts with government officials made on behalf of AMPI in regard to the pending proposed consent decree. Counsel for AMPI were directed on January 29, 1975 to prepare, serve, and file a § 2(g) statement.

On February 21, 1975 AMPI, without waiver of its previously stated position that the new Act does not apply to the proposed consent decree before this Court, filed its initial statement of contacts designed to comply with the requirements of § 2(g).[6] Counsel for NFO wrote the Court a letter on March 6, 1975 in which it contended that the AMPI statement did not comply with § 2(g). NFO suggested in that letter that "AMPI's efforts to negotiate a consent decree in this case have been continuing since the case was filed." NFO cited various pages of the June, 1974 Final Report of the Senate Watergate Committee to direct attention to political contacts which AMPI had had with the White House, the Justice Department and the Secretary of the Treasury as they related particularly to Section VI of that Report, entitled "Milk Producer Contribution Activity in 1972 prior to April 7, 1972, the Justice Department Antitrust Suit Against AMPI" and Section VIII of that Report relating to "Milk Producers Contributions to the President's Campaign After April 7, 1972," as those sections appeared on pages 699 through 743 of the Final Report.

It is appropriate to note that the series of letters written by counsel for NFO in regard to AMPI's Section 2(g) statement do not represent the first attempt on NFO's part to incorporate the Senate Watergate Committee's Final Report as a part of the record in this consent decree proceeding. NFO earlier wanted this Court to use the Watergate data for a different purpose; namely, to support its pending motion to intervene. NFO's rationale supporting the attempted use of the Watergate data is basically the same in both instances.

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[6] On January 25, 1975, AMPI filed a detailed memorandum of law in which it argued that the new Act, including but not limited to § 2(g), should not be given any retrospective effect. We need not reach that question because we believe that under the procedures we have directed, there has been adequate compliance with Section 2(g) under the circumstances of this case.

We therefore state the circumstances under which NFO first argued that the Final Report of the Senate Watergate Committee should be considered as relevant and material evidence in this consent decree proceeding. The transcript of the proceedings November 14, 1974 establishes that in order to ascertain the positions of the movants for intervention, the Court directed particular attention to page 9 of NFO's suggestions in support of its motion to intervene which stated "We want to make it clear that we are in no way questioning the integrity of government counsel in this case, or their motives in presenting this decree for approval." [Ibid, p. 7] Page 18 of that transcript shows that the Court directed a specific question to counsel for NFO and to counsel for Sentry (another movant for intervention) for the purpose of finding out "if the government has correctly concluded from what both of you have said that there is no claim of bad faith or malfeasance within the meaning suggested in *Sam Fox Publishing Co.*, to support intervention under Rule 24?"

Counsel for NFO assured the Court that the government had accurately quoted NFO's suggestions and stated that the comment "was specifically directed to Mrs. Schneiderman, to the people in the Chicago office, and the people within the Antitrust Division whom I know." NFO's counsel, of course, added that this comment was not intended to reflect a view that "the Government in its entirety and in those reaches of the Government inaccessible to counsel who represent it here have not made a deal."[7]

In light of the somewhat ambiguous answer it received from NFO's counsel, the Court granted an immediate recess in order to afford NFO an opportunity to outline in

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[7] Counsel for Sentry, in response to the same question, advised the Court that "we have no evidence whatsoever that would lead us to believe that there is any corruption at work in the formulation of this settlement."

writing what evidence it would adduce if afforded an opportunity at a plenary evidentiary hearing.[8]

After the recess, counsel for NFO read the following statement into the record:

> NFO is not charging crime or filing a complaint against the United States with respect to the Consent Decree, but is simply moving for intervention. In this connection, we would adduce the evidence developed by the Senate Watergate Committee and reflected in its final report, filed herewith as NFO's Exhibit A, and made a part hereof. We particularly call the Court's attention to the evidence with respect to the Milk Fund, pages 579 and following. This evidence, together with other material already of record in this case, constitutes, in NFO's view, a sufficient showing of corrupting influence at work on the Department of Justice and the Executive Branch in general with respect to AMPI's violations of the antitrust laws to warrant and indeed require allowance of such intervention under the exceptional case doctrine (*Cascade,* 386 U.S. 129), the malfeasance doctrine (*Sam Fox,* 366 U.S. 683), and the Caesar's wife doctrine of the *First National Bank of Lexington, Kentucky* case (280 F. Supp. 260, 263).

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[8] We stated the following on page 27 of the transcript of November 14, 1974:

> I am simply going to require during the recess that NFO, which is the only party that believes the record is not fully established to make any argument, to put down on a written list in long hand precisely who they would call to prove that the parties representing the United States in connection with the negotiation of this Consent Decree may properly be found as a matter of fact and under applicable law to have violated not only their duties as officers of the United States but their duties as officers of this Court, and that they are guilty of bad faith and malfeasance in the discharge of those duties. [Ibid, pp. 27-28]

> The witnesses and evidence which NFO would adduce as intervenors are:
>
> 1. Those named witnesses whose testimony is relied upon and reflected in the Final Report (Exhibit A hereto).
> 2. The testimony of Richard M. Nixon.
> 3. The official files of the Executive Branch relating to this matter (including Presidential files and tapes).
>
> NFO also requests leave to supplement this list if intervention be granted. [Ibid, pp. 30-31]

Counsel for NFO then suggested that further proceedings with respect to the motions to intervene be deferred until a later stage of the hearing "in the hope that progress might be made toward working out a decree more, in the NFO view, in the public interest than the present proposal" [Ibid, p. 31]. We indicated that we would take judicial notice of the Final Report of the Senate Watergate Committee and deferred ruling on the motions.

It is thus clear that NFO's attempted reliance upon the Final Report of the Senate Watergate Committee, and its effort to have that Final Report made a part of the record in this proceeding, was first suggested to support NFO's motion to intervene. NFO's letter of March 6, 1975 in which it cited particular portions of the Final Report as a basis for objecting to AMPI's original Section 2(g) statement was but an amplification of NFO's earlier reliance on the Watergate data at the November 14, 1974 hearing. NFO's March 6, 1975 letter simply reiterated its earlier position by quoting specific pages of the Senate Watergate Committee's Final Report which obviously reflect a great deal of lobbying and political activity on behalf of AMPI which the Senate Watergate Committee believed to support the ad-

verse findings made by that Committee. The general thrust of NFO's repeated argument is that those Congressional findings establish as a matter of fact that AMPI did in fact exercise a corrupting influence on particular officers of the United States. NFO takes the general position that this Court should draw an inference from the conclusions stated by the Senate Watergate Committee that representatives of the Antitrust Division of the Department of Justice may somehow have also been corrupted by AMPI's general lobbying activities. In short, NFO argues that the Final Report of the Senate Watergate Committee produced sufficient smoke to warrant and require this Court to reject AMPI's Section 2(g) filings and to grant NFO's motion to intervene in order that NFO be permitted, in a prosecutorial role, to conduct an evidentiary hearing under the circumstances.

We read the Senate Watergate Committee's Final Report and all other data which has been brought to our attention in the same manner that counsel for Sentry read that data. We find and conclude that we may not properly draw the inference which NFO would have this Court draw from the Watergate Committee's Final Report and other data. That data, in our judgment, does not support NFO's suggestion that corruption was at work in the formulation of the consent decree proposed in this case.

We have deemed it appropriate to deal with this particular matter in some detail and have treated NFO's letters to the Court in the same manner as if NFO had filed appropriate motions under the Rules requesting specific relief because we recognize the danger that confidence in the present administration of the Antitrust Division of the Department of Justice and confidence in the administration of justice in the courts of the United States as it relates particularly to the antitrust laws could be impaired by fragmentary newspaper reporting which could erroneously lead to the erroneous impression that approval of the pro-

posed consent decree in this case somehow resulted from procedures which failed to permit still another investigation of AMPI's lobbying activities.

In order that the emotional impact of the cry "Watergate" be subjected to factual scrutiny, we requested both AMPI and the government to amplify the § 2(g) information initially submitted by AMPI in order that the record would reflect any and all contacts which may have been made in connection with earlier unsuccessful attempts to negotiate a specific consent decree in this case. The government complied in its letter to the Court dated March 28, 1975. AMPI amplified its original § 2(b) [*sic*] statement in its letter to the Court dated April 9, 1975.

Counsel for NFO registered dissatisfaction with the government's statement in a letter to the Court dated April 4, 1975. That letter reiterated NFO's legal contention that § 2(b) [*sic*] "requires the defendant to disclose *all* lobbying contacts, irrespective of whether they culminated in recognized effects at the staff level of the Antitrust Division." Counsel for NFO attached a copy of a letter written April 4, 1975, to Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division, in which NFO requested a statement of the Antitrust Division's position with respect to enforcing the lobbying disclosure required by § 2(g). Consistent with its basic position both in connection with its expansive reading of § 2(g) and its argument in support of its motion to intervene, NFO contended that:

> The Senate Watergate Committee's Final Report shows that AMPI's lobbying contacts in this case have been intensive and gross, dating back long prior to February 1, 1971, when it was finally filed as a civil proceeding, and continuing at least until October, 1972. None of them which is reflected in that Report appears in the AMPI filing.

NFO stated its view that "AMPI's efforts which effectively subverted the criminal prosecution of AMPI recommended by the trial staff fall within the scope of the disclosure required by § 2(g) of the Act."[9] After referring to AMPI's alleged failure to include "highly significant

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[9] An example of how NFO would incorporate the Senate Watergate Committee's Final Report into this case is illustrated by the following reference to that Report contained in its April 4 ,1975 letter to Assistant Attorney General Kauper:

> We know that "resolution of antitrust problems" was a "subject of some discussion" between the milk producers and the White House in 1970 and 1971. "Jack Gleason [in 1969 and 1970 assistant to White House official Harry Dent] says he remembers meeting with [AMPI officials] Nelson and Parr in early 1970 and discussing their concern over possible trouble from the Justice Department." (Senate Watergate Committee Final Report, page 705.) Indeed, during the period that Attorney General Mitchell had under consideration the Antitrust Division's request to conduct grand jury proceedings against AMPI, Attorney General Mitchell apparently talked about the matter with President Nixon's fiscal aide, Mr. Kalmbach—who had earlier received $100,000 in cash in a black bag from AMPI—and with AMPI Washington counsel, Murray Chotiner. At this time Mr. Chotiner also met with Mr. Haldeman, then White House Chief of Staff. On November 4, 1971, a White House political matters meeting was held whereat Messrs. Haldeman and Mitchell discussed the Justice Department's pending antitrust investigation and in that connection "milk money." Documentary evidence of the meeting "clearly suggests that the Attorney General was informed of the connection between the milk producers under investigation and "milk money" and that Haldeman and the Attorney General discussed the investigation in the context of the campaign and milk producer contributions." (Final Report, page 707)
>
> On November 30, 1971, in a departure, according to [Assistant Attorney General] McLaren, from Department practice, Attorney General Mitchell rejected the request for a grand jury investigation of AMPI. In a one-line memorandum, he instructed McLaren, " 'per our conversation, I request that you go the civil route,' thereby limiting the case to a civil suit only." (Final Report, page 701).

post-February 1, 1971 lobbying efforts in its § 2(g) statement and Certificate" and after referring to lobbying contacts made after that date as documented in the Senate Watergate Committee's Final Report, NFO argued that "if § 2(g) . . . means anything, it requires a comprehensive reporting by AMPI of the above listed matters."

The Court received a copy of Ms. Schneiderman's letter of April 18, 1975 written to NFO counsel on behalf of Assistant Attorney General Kauper in response to NFO's letter of April 4, 1975. That letter advised the Court that the government did not consider that either of AMPI's § 2(g) statements to be deceptive or misleading. The government properly suggested that, in the final analysis, the determination of whether AMPI has satisfied the substance of the requirements of § 2(g) was a matter for this Court's determination.

NFO did not respond to the government's statement until April 25, 1975. On that date NFO's counsel wrote this Court a letter in which it reiterated that it was not satisfied with the procedures which had been directed and suggested that the public interest would not be properly protected unless NFO was authorized to intervene in the present proceeding and, in effect, be authorized to adopt the prosecutorial role which NFO contends has been dropped by the government.

We do not believe and do not determine that AMPI's § 2(g) filings are, or will in the future, be considered as a model to be used for future cases. We nevertheless are convinced that under the circumstances of this case the various political activities and lobbying contacts by AMPI cited by NFO from the Senate Watergate Committee's Final Report were reasonably apparent from the pretrial discovery conducted in this case long before AMPI was required to file either its original § 2(g) statement or its later amplified § 2(g) statement.

The fundamental defect in NFO's position demanding still further AMPI investigation is reflected by its consistent insistence that *all* political activities and *all* lobbying contacts are within the coverage of § 2(g).

In light of the statements made to this Court at the November 14, 1974 hearing, and in light of NFO's subsequent failure to indicate with any degree of particularity as to whether or not NFO had any claim or evidence which could reasonably be said to suggest that anyone connected with the Antitrust Division had been corrupted by any of AMPI's Watergate activities, we refuse to accept NFO's implicit argument that "where there is smoke, there must be fire." We find and conclude that an insufficient showing has been made by NFO to support the necessity for rejection of AMPI's Section 2(g) filings or to direct any further evidentiary hearing to inquire into whether the proposed consent decree was the result of either bad faith or malfeasance on the part of the representatives of the United States who in fact negotiated and proposed the consent decree in its proposed form.

We are confident that so far as the personnel of the Antitrust Division of the Department of Justice involved in the actual negotiation of the pending proposed consent decree are concerned, all such persons were uninfluenced by outside political pressure and that the proposed consent decree was in fact negotiated in good faith and without malfeasance on the part of the representatives of the United States who in fact negotiated and proposed the consent decree. We so find.

For the reasons stated, we find and conclude that the procedures directed by this Court in connection with § 2(g), assuming that said section is retrospectively applicable, have adequately complied with that section and that no additional procedures, including evidentiary hearing, are necessary or appropriate under the ciruemstances.

IV.

During the course of the proceedings we advised counsel for the government and for AMPI that the proposed consent decree would not be approved unless the provisions of Paragraphs IX and V were modified. Accordingly, on February 24, 1975 consistent with the Court's indicated concern in regard to the language of those provisions, counsel for the government and AMPI presented an agreed order making substantial modification of both those paragraphs consistent with the views stated to counsel by this Court. An additional agreed order was presented the Court on March 6, 1975 which made clear that any and all separate regional or sectional cooperatives which might be created by any reorganization or restructuring of AMPI would be bound by any final judgment entered in this case.

Definitive action on the proposed consent decree was delayed by the commencement of a grand jury investigation instituted by the government in the Western District of Texas. The Court was advised in late February, 1975 that AMPI was giving consideration to attempting to withdraw from the proposed consent decree. It was not until March 18, 1975 that the Court was advised that AMPI was satisfied with the responses it had received from the government in regard to the scope of the grand jury investigation being conducted in the Western District of Texas at San Antonio. This Court, however, was not in a position to give final consideration to the proposed decree and the pending motions to intervene until AMPI's expanded Section 2(g) statement was filed April 9, 1975 and until it had received and considered NFO's most recent response to that filing.

In the next part of this opinion we shall state the reasons why the pending motions to intervene will be denied. We shall then state the reasons why the proposed consent decree, as modified by the agreed orders above described should be approved. In the last part of this opinion we state

the reasons why we believe it is appropriate that on our motion we enter a supplemental order which will establish enforcement and modification procedures in regard to the approved consent decree.

Section 2(f)(3) of the Antitrust Procedures and Penalties Act codified existing law when it provided that the Court shall have discretionary power to authorize "full or limited participation in the proceedings before the court." While the words "full or limited participation" are not defined in the Act, we believe it clear that the Congress recognized that under existing law, the court could, in the exercise of its discretion, permit "full participation" of an interested person by granting such a person the status of a party pursuant to a motion to intervene authorized by Rule 24 of the Rules of Civil Procedure. "Limited participation," on the other hand, contemplated the recognition of such a person by permitting his appearance as amicus curiae. Indeed, Section 2(f)(3) recognized the great flexibility of equity jurisprudence by providing that the court could authorize an interested person's participation in the proceeding "in any other manner and extent which serves the public interest as the court may deem appropriate."

Whether "limited participation" is to be permitted by way of amicus curiae appearance or whether "full participation" is to be permitted by the granting of an interested person's Rule 24 motion to intervene must be determined in light of the circumstances of a particular case and in light of the scope of judicial power and discretion which may be properly exercised in regard to the approval or rejection of a proposed consent decree.

We are convinced that lower federal courts must follow the guidance of the dictum of *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961) and thus "decline to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the

part of the Government in so acting." We do not believe that *Sam Fox Publishing Co.* was overruled by *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967). We are equally convinced that *Swift & Co.* v. *United States,* 276 U.S. 311, 331-32 (1928), still states the applicable standard in regard to the broad scope of the Attorney General's discretion, i.e., "His authority to make determinations includes the power to make erroneous decisions as well as correct ones."

The Supreme Court recently handed down one of its relatively infrequent decisions relating to consent decrees when it decided *United States* v. *ITT Continental Baking Co.,* ... U.S. ..., No. 73-1290, decided February 19, 1975, but not yet officially reported [43 U.S. L.W. 4266].[10] Mr. Justice Stewart, joined by the Chief Justice, Mr. Justice Powell and Mr. Justice Rehnquist, cited a Note entitled "ITT Dividend: Reform of Department of Justice Consent Decree Procedures," 73 Col. L. Rev. 594 (1973), in the course of his dissenting opinion for the purpose of directing attention to the fact that 70 to 80% of all antitrust complaints filed by the Department of Justice terminate in consent decrees. We believe that the Columbia Law Review Note is valuable for other purposes. That Note directed attention to the fact that "For well over three decades, knowledgeable observers have criticized the process by which the Antitrust Division of the Department of Justice negotiates and settles antitrust cases by way of consent decrees." [Ibid, p. 594]

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[10] *ITT Continental Baking Co.* dealt with an application of the "four corners" rule of *United States* v. *Armour & Co.,* 402 U.S. 673 (1971). The Court concluded that the gloss of *Armour,* read together with what had been said in *United States* v. *Atlantic Refining Co.,* 360 U.S. 19 (1959) and *Hughes* v. *United States,* 342 U.S. 353 (1952), requires that appropriate recognition be given the fact that "consent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." [Slip opinion, p. 11]

We believe that it can fairly be said that this Court recognized from the outset of the pending proceeding that much of the criticism directed at the procedures relating to consent decrees was legitimate and that discretionary judicial power should be exercised to direct procedures which would meet such criticism.[11]

We believe that the Note accurately stated the nature of criticism which, in our judgment, had been properly directed against consent decree procedures:

> Criticism of consent decree procedures focuses on the failure of the Justice Department and the courts to give substantial consideration to the views of third parties, the secrecy of the negotiation process itself, and the minimal judicial scrutiny of the proposed decree. These weaknesses are said to have an adverse effect on the public at large, which expects to be protected by adequate enforcement of the antitrust laws, and on private treble damage claimants in particular, who have found it essentially impossible to intervene in a decree proceeding to protect their interest and make their views known. [Ibid, p. 597].

Courts, of course, cannot do anything about "the secrecy of the negotiation process itself." Indeed, a court's power to do very much about the terms of a particular decree, even after it has given the decree maximum, rather than minimum, judicial scrutiny, is a decidedly limited power. See *United States* v. *Ward Baking Co.* 376 U.S. 327 (1964). Power to reform the procedures under which consent decrees are actually negotiated is vested in the executive and

[11] We agree, of course, with the statement in the Note that "Most of the procedural devices contained in the Tunney bill have long been available to the courts to investigate decrees" and that "the specific guidelines for judicial investigation [now incorporated in the Antitrust Procedures and Penalties Act], all discretionary with the court, are hardly revolutionary."

legislative branches, not the judicial. And, if the Congress wants the judicial branch to have more power than that implicit in a threat of total rejection of a proposed decree, such power must be authorized by legislation which is considerably broader in scope than that vested by the newly enacted Antitrust Procedures and Penalties Act or by existing law.

Courts have long had power, however, as the procedures directed in this case demonstrate, to devise and direct appropriate procedures to enable the Department of Justice and the court to have the benefit of the views of third parties. Courts which accept Brandeis' idea that "[s]unlight is said to be the best of disinfectants," L. Brandeis, *Other People's Money,* 92 (1914 ed.), have exercised that power under the circumstances of a particular case. That objective may be effectively attained by procedures which do not include the complications which may result from the granting of a formal motion to intervene as a party.

The text of the Note accompanying Notes 159-211 cites the familiar cases which reflect the reluctance of courts to grant more than limited participation of interested persons by way of amicus curiae appearance. Neither the Tunney bill nor the Bayh bill even proposed to change existing law in regard to third party participation. At page 629 of 73 Col. L. Rev. it is accurately stated that "The basic policy question in third party participation in consent decree proceedings is whether such participation is best secured by liberalized intervention. Both proposed bills answer the question in the negative, implying that adequate participation is assured by improved comment periods and greater judicial activism without necessitating procedural entanglements that liberalized intervention might well entail." [Ibid, p. 629]

Cases such as *United States* v. *International Telephone & Tel. Co.,* (D. Conn. 1972), *aff'd. sub nom., Nader et al* v.

United States, et al., 410 U.S. 919, make clear that none of the persons who seek to intervene in this case have sufficient standing to intervene as a matter of right under Rule 24(a)(2).[12] Whether permissive intervention should be granted under Rule 24(b) is a matter of discretion. Whether discretion should be exercised favorably must be determined in accordance with the circumstances of this particular case.

Under the procedures directed and followed in connection with the proposed consent decree in this case, this Court has already had the benefit of the view and comments of all persons who have filed motions to intervene. Certainly, all such persons have been permitted to express their views and to make specific and particularized comment on each paragraph of the proposed consent decree. The filings of the government establish that it has given appropriate consideration to those comments and has stated the reasons why some were accepted and most were rejected. Neither the government nor this Court would obtain any more information or benefit from granting any person the status of an intervenor. (See pages 11, et seq. of the transcript of November 14, 1974 for a full statement of how this Court treated the status of an amicus curiae appearance).

We recognize that this Court must give appropriate consideration to the impact of a consent judgment upon the private antitrust plaintiffs in JMPL Docket No. 83. But

[12] See also *United States* v. *Automobile Manufacturers Association*, (C.D. Calif. 1969) 307 F. Supp. 617, aff'd. per curiam *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970); *United States* v. *Paramount Pictures*, 333 F. Supp. 1100 (S.D. N.Y. 1970), aff'd. per curiam *sub nom. Syufy Enterprises* v. *United States, 404 U.S. 802 (1971); United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), aff'd per curiam *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968); *United States* v. *CIBA Corp.*, 50 F.R.D. 507 (S.D. N.Y. 1970); *United States* v. *National Bank and Trust Company*, 319 F. Supp. 930 (E.D. Pa. 1970).

appropriate consideration of that factor does not require that any private plaintiff be granted the status of a full party in this proceeding.[13] Nor do we believe that the question of whether a private party should be granted full, rather than limited, participation in a consent decree proceeding should turn on whether the private party would or would not have a right of appeal from a final judgment approving the proposed consent decree over his objection. This view was expressed by then Assistant Attorney General Donald F. Turner, who stated in a letter to Rep. Emanuel Celler that:

> The very process of formal intervention, if that is held to carry with it the full rights of the usual litigant to present evidence and to appeal, would threaten to eliminate one of the major motivating factors that leads both the Government and the defendants to at-

[13] Nor does any particular private plaintiff have any more standing than any other private plaintiff to claim that its view of the proposed consent decree reflects the public interest. It is obvious that the various plaintiffs in JMPL Docket No. 83 take different views of what the public interest requires.

For example, NFO and the other movants for intervention contend that the public interest requires rejection of the proposed consent decree. On the other hand, the Court was advised in a letter dated April 18, 1975 from counsel for the private plaintiffs in the cases filed in the Southern District of Texas that a settlement of that litigation has been agreed upon, conditioned only upon the entry of the proposed consent decree. Counsel for the Texas private plaintiffs accordingly urge that the public interest requires that the proposed consent decree be approved forthwith.

That circumstance is, of course, unique in regard to the massive private litigation involved in JMPL Docket No. 83. For it is reasonably certain that most, if not all, of the private antitrust cases, excepting only those filed in the Southern District of Texas, will be tried rather than settled. Counsel for the numerous parties involved have permitted several logical times for the commencement of settlement negotiations to pass without notice. We have no reason to believe that a different course of action in regard to settlement will be followed in the future.

tempt to work out an appropriate decree, since intervention would force on the Government and defendants at least some of the burdens of litigation that both, for diverse reasons, have sought to avoid. [39 Univ. of Chicago L. Rev. Fall 1971 (p. 151)] [14]

We may assume that it is quite likely one or more of the movants for intervention, should their motions be granted, would pursue an appeal from our order approving the proposed consent decree. But our denial of the various motions to intervene would not foreclose the possibility of that obvously complicating circumstance. For the movants have the right in any event to seek appropriate appellate review of our action denying their respective motions to intervene. We accordingly expressly state that our denial of the pending motions to intervene is not based upon the notion that the processing of JMPL Docket No. 83 would be made less complicated by a denial, rather than a grant, of the pending motions to intervene.

Because we are convinced that all interested persons have been afforded every right to fully and fairly state their views and comments which formal intervention would have granted, and because we are convinced that the granting of the motions to intervene would not serve any appropriate purpose under the circumstances, we find and conclude that all pending motions to intervene should, in the exercise of our discretion, be denied.

VI.

Much of what has been thus far said is directly related to the determination of the ultimate question presented in this proceeding, namely, whether under all of the circum-

[14] BNA Antitr. & Trade Reg. Rep., Mar. 21, 1967, at X-1, X-3; cited in Note *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. Chi. L. Rev. 143, 151, n. 35 (1971).

stances, the entry of the proposed consent decree as a Final Judgment would be in the public interest.

That portion of § 2(e) ofthe Antitrust Procedures and Penalties Act which provides that "before entry of any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest" is, in our judgment, an accurate codification of existing case law. Our view is consistent with the following evaluation of § 2(e) as contained in Senate Report #93-298, which was quoted with approval in House Report No. 93-1463 (U.S. Code Cong. and Admin. News, 93rd Cong. 2nd Sess., pp. 7660-61):

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible. Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.

Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs. The primary focus of the Department's enforcement policy should be obtain a judgment—either litigated or consensual—which protects the public by insuring healthy competition in the future. The Commit-

tee believes that in the majority of instances the interests of private litigants can be accommodated without the risk, delay and expense of the government going to trial. For example, the court can condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims.

The various filings made by the government pursuant to the procedures directed in this case, and particularly the detailed response of the United States filed October 11, 1974 have afforded this Court the detailed type of information contemplated by the competitive impact statement of the new Act. Our study of the economic analysis of the AMPI monopoly prepared by Eisenstat, Masson and Roddy has fully acquainted the Court with the government's economic rationale.

The proposed consent judgment, the relief to be thereby obtained, and the anticipated effect of the consent judgment on competition has been more than adequately explained. The Court is fully familiar with the remedies available to private plaintiffs because of its pretrial supervision of JMPL Docket No. 83. Parties to that litigation who have stated the view that more stringent relief should have been provided in the consent decree are in no way foreclosed from urging that view in the private litigation. We are satisfied that the government actually considered and evaluated all of the various alternatives which the various persons have suggested and, in connection with most, ruled out the various alternatives recommended by third persons during the course of negotiations for reasons which have been adequately stated and explained.[15]

[15] A good example of that process is illustrated by ARSPC's position in regard to Paragraph X of the proposed consent decree. See pages 105, et seq. of the transcript of proceedings for November 15, 1974.

We have considered the competitive impact of the proposed consent decree, including but not limited to the government's determination that dissolution or divestiture is not required to restore competition and its conclusion that such divestiture would not be in the public interest. We find and conclude that the determination made by the government is well within the discretionary power of the Attorney General under existing law.

We have fully considered the impact of the entry of the proposed consent decree upon the public generally, and its impact upon third party plaintiffs in private antitrust litigation. We find and conclude that the public generally and the private plaintiffs would be benefited by the entry of the proposed consent decree and that it would not be in the public interest to reject the proposed consent decree and thereby force the parties to trial.

While we believe the provisions for enforcement and modification are consistent with existing law, and well within the discretion vested in the Attorney General, we shall enter a supplemental order in that regard for reasons to be stated in the next part of this opinion.

VII.

The transcripts of the proceedings held in September and November, 1974, reflect this Court's concern with the problem of enforcement of antitrust consent decrees. During the course of those proceedings we made reference to Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. Law & Econ. 365 (1970) and to Schuwerk, *Private Participation in Justice Antitrust Proceedings*, 39 Univ. of Chicago L. Rev. 143 (1971).[16]

[16] Specific reference was made to that portion of footnote 78 of Schuwerk's work which stated that "While the power of a court to punish consent decree violations through contempt proceedings is unquestioned, this power has seldom been utilized. There are three

A great deal of attention has been directed to the fact that somewhere between 70 and 80% of all civil antitrust complaints filed by the Department of Justice are terminated by consent decrees. Very little legislative or judicial attention, however, has been focused on the question of whether and how consent decrees have been enforced.

We have noted above that any changes in the manner in which consent decrees are secretly negotiated must be made by the executive or legislative branches of the government. We are convinced, however, that particular aspects which relate to enforcement of a consent decree may be improved by judicial action. We are of the opinion that many persons who may be affected by a consent decree simply do not possess and are not furnished any information in regard to the manner in which alleged violations of a final judgment entered upon a proposed consent decree are to be brought before the Court for appropriate judicial enforcement proceedings.

The Supplemental Order establishing enforcement and modification procedures is entered with the hope that public information concerning a clear definition of applicable and available procedures for enforcement and modification of the final judgment entered in this case will improve the

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interlocking reasons for this. First, the Division practically never initiates contempt proceedings. Professor Posner reports that since the inception of the antitrust laws, the Government has instituted criminal contempt proceedings on only twenty-two occasions and has been successful in only twelve of these instances. Posner, supra note 1, at 387 (Table 16). Professor Goldberg, writing in 1962, could find only thirty-nine instances of contempt proceedings brought in connection with antitrust consent decrees since 1890. M. Goldberg, supra, note 2, at 66. Another commentator could discover only three such efforts in the period from 1960 to 1969. Note, supra note 36, at 1344. Thus, at most a total of forty-two attempts to punish decree violations through contempt proceedings have been made in approximately eighty years. [39 Univ. of Chicago L. Rev. Fall 1971, p. 161]

administration of justice in regard to the enforcement of the final judgments obtained by way of consent decrees.

For the reasons stated, it is

ORDERED (1) that the pending motions to intervene should be and the same are hereby denied. It is further

ORDERED (2) that the proposed consent decree attached to the stipulation filed August 13, 1974 should be and the same is hereby approved. It is further

ORDERED (3) that the agreed orders presented to the Court on February 24, 1975 and March 6, 1975 in which Paragraph IX and V of the proposed consent decree were modified and in which the scope of final judgment was further defined should be and the same hereby are approved. It is further

ORDERED (4) that the Final Judgment attached hereto as Appendix B, which substitutes and adds the paragraphs included in the agreed orders described in the preceding order, should be approved and entered by the Clerk as the Final Judgment in this case. It is further

ORDERED (5) that the Supplemental Order, attached hereto as Appendix C, establishing enforcement and modification procedures in regard to the Final Judgment should be and the same is hereby approved and ordered entered by the Clerk.

/s/ JOHN W. OLIVER
United States District Judge

Kansas City, Missouri

April 30, 1975

TABLE OF CONTENTS

SPECIFIC RESPONSES TO ISSUES
RAISED BY PARTICULAR
THIRD PARTIES

(CAPTION OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Final Judgment

Plaintiff, United States of America, having filed its Complaint herein on February 1, 1972, and the parties hereto, by their respective attorneys, having consented to the making and entry of this Final Judgment, prior to the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and without admission by either party in respect to any issue:

NOW, THEREFORE, prior to the taking of any testimony, before any adjudication of any issue of law or fact herein, and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

I.

This Court has jurisdiction over the subject matter of this action, and of the parties hereto. The complaint states claims upon which relief may be granted under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §§ 1 and 2), commonly known as the Sherman Act.

II

As used in this Final Judgment:

(a) "Base" means the volume of milk assigned by defendant to certain member-producers for which such member-producer receives a price greater than the price received for milk marketed by such member-producer in excess of his assigned base;

(b) "Committed supply" means a supply of milk which defendant commits itself to deliver to a processor for a period in excess of one month;

(c) "Cooperative" means a person which meets the requirements of 7 U.S.C. § 291;

(d) "Cost" means the fully allocated costs as determined on the basis of generally accepted accounting practices consistently applied;

(e) "Direct shipped milk" means milk which is shipped direct from the farm at which it is produced to the processor;

(f) "Federal Milk Marketing Order" means a marketing agreement or order, and applicable regulations and rules of practice and procedure, relating to the handling of milk and adopted pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601, *et seq.*);

(g) "Fluid milk" means pasteurized milk sold for human consumption in fluid form;

(h) "Former member-producer" means a nonmember-producer who once belonged to defendant but has lawfully terminated any membership or marketing agreement or contract with defendant;

(i) "Member-producer" means a producer belonging to defendant;

(j) "Milk" means raw milk produced by cows prior to pasteurization;

(k) "Milk hauler" means a person, not an employee of defendant, who owns or operates trucks which transport milk;

(l) "Milk products" means products manufactured from milk, such as butter, ice cream, cheese, and powdered milk;

(m) "Nonmember-producer" means a producer not belonging to defendant or any cooperative of producers not belonging to defendant;

(n) "Person" means any corporation, partnership, association, individual, cooperative, or other business or legal entity;

(o) "Plant" means the land, buildings, facilities, and equipment constituting a single operating unit or establishment in which milk or milk products are received, transferred, reloaded, processed, or manufactured;

(p) "Processor" means a person engaged in the business of purchasing milk and processing, bottling, or packaging fluid milk or milk products or manufacturing milk products;

(q) "Producer" means any person engaged in the production of Grade A milk; and

(r) "Southern Region" means the following geographic area:

Texas, Oklahoma, Arkansas; Campbell County, Tennessee and the area in Tennessee west of and including Henry, Carroll, Henderson and Hardin Counties; the area in Kentucky south or west of and including Ballard, Graves, and Calloway Counties; the area in New Mexico east of and including San Juan, McKinley, Valencia, Socorro, Sierra, and Dona Ana Counties; the area in Kansas west of and including Marshall, Pottawatomie, Geary, Morris, Chase, Coffey, Anderson, and Linn Counties; La Plata and Montezuma Counties in Colorado; De Soto County in Louisiana; Gage, Jefferson, Johnson, Pawnee, and Thayer Counties in Ne-

braska; the area in Mississippi north of and including DeSoto, Tate, Panola, Lafayette, Pontotoc, Lee and Tawamba Counties; and Bates, Butler, Howell, Jasper, McDonald, Newton, Stoddard, Taney, Vernon, Cass, Cedar, Barry, Christian, Ripley, New Madrid, Dade, Stone, Douglas, Oregon, Dunklin, St. Clair, Lawrence, Ozark, and Shannon Counties in Missouri.

III

The provisions of this Final Judgment applicable to the defendant shall also apply to each of its directors, officers, agents, employees, subsidiaries, successors, assigns and their subsidiaries, and, in addition, to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

The defendant is hereby enjoined and restrained from:

(a) Entering into or enforcing any contract, agreement, or understanding with any milk hauler which requires that such milk hauler transport milk for a member-producer only, but defendant may require that a milk hauler not commingle member-producer milk with nonmember-producer milk unless such requirement would be inconsistent with the provisions of Section VI of this Final Judgment;

(b) Using threats, coercion, or undue influence to induce any milk hauler to refuse or threaten to refuse to haul milk for any nonmember-producer or to induce any processor to refuse to deal with any milk hauler, but defendant may require that a milk hauler not commingle member-producer milk with nonmember-producer milk unless such requirement would be inconsistent with the provisions of Section VI of this Final Judgment;

(c) Purchasing or acquiring control of any milk hauler or of any hauling equipment of any milk hauler who, at the time of the purchase or acquisition of control, is hauling any milk of any nonmember-producer, unless defendant insures that facilities for shipping milk to the plant to which milk of said nonmember-producer is customarily delivered at the time of said purchase or acquisition of control are available to said nonmember-producer on comparable terms and conditions;

(d) Using threats, coercion, or undue influence to induce any processor to give to defendant preferred access to unloading or testing facilities of said processor;

(e) Entering into or enforcing any contract, agreement, or understanding with any processor which binds such processor to purchase a committed supply of milk from defendant for a period in excess of one (1) year or where the effect of entering into such contract(s), agreement(s) or understanding(s) may be to substantially lessen competition or tend to create a monopoly;

(f) Requiring any processor, as a condition of receiving any milk from defendant, to enter into any contract, agreement, or understanding for a committed supply of milk;

(g) Interfering or attempting to interfere with the exercise of the right of any processor to buy milk from a nonmember-producer at whatever prices, terms, or conditions said processor may choose, except that nothing herein shall limit defendants rights under the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et seq.*;

(h) Requiring or attempting to require any processor or nonmember-producer to use services supplied

by defendant, except that defendant may offer services to any processor or nonmember-producer at the cost of providing such services to member-producers;

(i) Requiring or attempting to require any processor, as a condition to the sale or delivery by defendant of any milk to said processor, to deliver to defendant anything of value based on milk sold to said processor by any nonmember-producer;

(j) Requiring or attempting to require any processor to purchase milk for delivery to one plant as a condition to the sale and delivery of milk to any other plant of such processor;

(k) Entering into or enforcing any contract, agreement, or understanding with any person, or aiding or causing others to enter into or enforce any contract, agreement, or understanding with any person, which has the purpose or effect of limiting said person's right to sell or dispose of milk wherever, to whomever, pursuant to whatever prices, terms, or conditions said person chooses to sell or dispose of such milk, provided that nothing herein shall prohibit defendant from selling milk on a classified price basis according to use or from entering into a common marketing agreement with other persons as authorized or permitted under 7 U.S.C. § 291 unless said common marketing agreement is prohibited by Section X of this Final Judgment;

(l) Discriminating or threatening to discriminate against any processor (i) who purchases or proposes to purchase milk from any person other than defendant for any or all of said processor's plants, or (ii) who resells or delivers or proposes to resell or deliver milk to any other processor, in any way, including but not limited to the following:

(1) refusing, limiting or reducing or threatening to refuse, limit or reduce the sale or delivery of milk to said processor;

(2) refusing or threatening to refuse to sell a committed supply of milk to said processor;

(3) charging said processor a higher unit price for milk delivered to a plant of said processor than defendant charges for milk delivered to a plant of any competitor of said processor located in the same Federal Milk Marketing Order area or, if no Order exists, in the same geographic area, for milk sold on the same basis for similar use;

(4) engaging in less reliable or otherwise less favorable delivery practices for milk delivered to said processor than defendant furnishes to any competitor of said processor for milk delivered to a plant of said competitor operated in either the same Fedral Milk Marketing Order area or, if no Order exists, in the same geographic area;

(5) delivering a lower or less desirable quality of milk to said processor than defendant delivers to a plant of any competitor of said processor operated in either the same Federal Milk Marketing Order area or, if no Order exists, in the same geographic area;

(6) refusing to provide any service, discount or subsidy for milk delivered to a plant of any processor on the same terms and conditions as defendant offers for milk delivered to a plant of any competitor of said processor operated in either the same Federal Milk Marketing Order area or, if no Order exists, in the same geographic area;

(7) failing to offer to compensate said processor for any service performed, such as field

services, on the same terms and conditions on which defendant compensates any competitor of said processor operating plants in either the same Federal Milk Marketing Order area or, if no Order exists, in the same geographic area;

(8) requiring said processor to account for its purchases of milk from defendant at any plant in any calendar month on a classified price basis in any manner which results in a larger percentage of the volume of milk supplied by defendant being purchased at the price defendant charges for the highest value utilization than is the percentage of the volume of milk supplied by all producers which is used by said processor in the highest value utilization at all plants receiving milk regulated under the same Federal Milk Marketing Order and owned or operated by said processor in the calendar month;

provided that nothing in this paragraph IV (l) shall prevent defendant from (i) charging said processors different prices for milk based upon differing methods of handling or delivering milk, if (a) said differences in price are reasonably related to differences in defendant's cost; and (b) said differences in price are not charged for the purpose of inducing any processor to cease, limit, reduce, or not make purchases from nonmember-producers; (ii) charging processors different prices for milk based on its use; or (iii) meeting lower prices of a competitor of defendant;

(m) Directly or indirectly offering to sell fluid milk or milk products to any customer of any person who sells fluid milk or milk products processed from milk produced by any nonmember-producer at prices lower than prices at which defendant offers to sell fluid milk or milk products to a similarly situated competitor of said customer;

(n) Directly or indirectly selectively soliciting any customer of any processor who sells fluid milk or milk products processed from milk produced by a nonmember-producer;

(o) Using threats, coercion, or undue influence to induce any producer to join or refrain from terminating its membership in defendant or to deliver its milk to defendant;

(p) Entering into any membership or marketing agreement with any member-producer which binds such member-producer to deliver milk to defendant for a term in excess of one (1) year, except any such contract may provide for automatic renewal for succeeding periods of one (1) year, if either party does not give notice of termination at least thirty (30) days prior to the termination date of such contract, and provided that defendant will promptly provide any member-producer, who so requests, with written notice of the termination date of his contract and the dates on which he can effectively give notice of termination of said contract;

(q) Compelling or attempting to compel any member-producer to enter into any contract, agreement, or understanding which restricts the right of said member-producer to sell any milk to any processor after said member-producer has lawfully terminated his membership and marketing agreement or contract with defendant; except that defendant may require any member-producer who sells or otherwise transfers base to enter into a contract, agreement, or understanding with the transferee of base which provides that, for a period of two (2) years from the date of said transfer, said transferor will not compete with defendant for fluid milk sales in the Southern Region;

(r) Qualifying milk under any Federal Milk Marketing Order with a purpose of forcing, coercing, or inducing nonmember-producers to join defendant or to cease selling milk in competition with defendant.

V

Defendant is hereby ordered and directed for a period of three (3) years from the entry of the Final Judgment to notify each member-producer of the termination date of his membership or marketing agreement, and of the dates on which he can effectively give notice of termination of such agreement; said notice must be given to each member-producer by defendant annually not more than fifty-five (55) days or less than fifteen (15) days prior to the first day on which said member-producer can effectively terminate said membership or marketing agreement; the provisions of this Section V shall not apply to any member-producer whose membership or marketing agreement is for a term of one (1) month or less.

VI

The defendant is hereby enjoined and restrained, for a period of three (3) years from the entry of this Final Judgment from refusing or threatening to refuse to deliver or to market the milk of any former member-producer on the same basis as it delivers or markets the milk of any member-producer whose milk is customarily delivered to the same plant to which the milk of said former member-producer's milk was customarily delivered at the time his membership or marketing agreement with defendant is terminated; the obligation of defendant to continue marketing the milk of any former member-producer shall be from the date defendant receives written notice of the termination of the membership or marketing agreement with defendant to the date at which said plant may terminate its contract with defendant or for four (4) months from the date of the termination of the membership or marketing agreement, whichever is longer.

VII

The defendant is hereby enjoined and restrained for a period of five (5) years from the entry of this Final Judgment from refusing or threatening to refuse to receive milk produced by any producer on equivalent and non-discriminatory terms, within the limits permitted by 7 U.C.S. § 291, and §§ 1381 through 1388 of the Internal Revenue Code of 1954, as amended, and regulations issued pursuant thereto (or as the same may be amended from time to time), to the extent of the available capacity of any plant of defendant in excess of capacity needed for the handling of milk of member-producers; provided, however, that nothing in this Section VII shall require defendant to pay any cooperative or processor delivering to defendant's plants (other than unregulated plants described in Section X of this Final Judgment) more than the value of the milk to said plant, said value to be determined by the current market price of the products manufactured at said plant, and the yields and the make allowances as used in the federal dairy price support program and announced for the market year.

VIII

The defendant is hereby enjoined and restrained for a period of five (5) years from the entry of this Final Judgment, from exercising its right to vote on behalf of its members pursuant to the terms of 7 U.S.C. §§ 608c(9)(B), 608c(12) and 608c(16)(b), if the effect of such vote will be to terminate any existing Federal Milk Marketing Order.

IX

The defendant is hereby enjoined and restrained, for a period of ten (10) years from the entry of this Final Judgment from purchasing, consolidating with, acquiring

control of, or leasing any plant (except for renewal of an existing lease) without the prior written consent of the Department of Justice or the Court. At least forty-five (45) days in advance of the closing date of any transaction to purchase, consolidate with, acquire control of or lease any such plant, defendant shall supply plaintiff with complete details concerning the terms and conditions of the proposed transaction. Within thirty (30) days after its receipt of the above information plaintiff shall advise the defendant of any objection it may have to the consummation of the proposed transaction. If such an objection is made by plaintiff, then the proposed transaction shall not be consummated unless approved by the Court on the basis of a showing by defendant that the proposed transaction will not substantially lessen competition in any line of commerce, in any section of the country.

X

The defendant is hereby enjoined and restrained, for a period of ten (10) years from the entry of this Final Judgment, from participating in any plan or program with any cooperative or with any organization whose members are cooperatives relating to the purchase or option to purchase milk from plants not regulated under any Federal Milk Marketing Order, or from any producer shipping milk to said plant, unless said plan or program provides:

(a) that any plant not regulated under any Federal Milk Marketing Order may enter into a contract, on a non-discriminatory basis, to grant an option to purchase milk pursuant to a plan or program to establish or maintain a reserve supply of milk if said plant meets similar standards of quantity and quality as are met by any plant under such a contract and said plant is in competition for the procurement of raw milk with any plant which is under

contract to supply milk pursuant to such a plan or program;

(b) that there shall be no discrimination against any contracting plant which receives milk from non-member-producers;

(c) that any contracting plant shall be permitted to dispose of any milk for which a purchase option is not exercised at least 24 hours prior to the time the milk is picked up from the farm to whomever, wherever, and upon whatever terms and conditions it chooses; there shall be no discrimination against any plant which resells milk on which said option is not exercised;

(d) that any cooperative may participate in said plan or program on an equivalent and non-discriminatory basis;

(e) that any participating cooperative shall be permitted to resell milk obtained through such plan or program to whomever, wherever, and on whatever terms and conditions it chooses;

(f) that no contract, agreement, or understanding entered into pursuant to such plan or program shall exceed a term of one (1) year;

(g) that said plan or program shall be used for the purpose of establishing and maintaining a reserve supply of milk to fulfill the requirements of participating cooperatives and for that purpose only;

(h) that in the event said plan or program is carried out through any organization all of whose members are cooperatives, persons receiving orders from participating cooperatives and directing the shipment of milk pursuant to such plan or program shall be independent of and shall not be employed by any participating plant or cooperative; and regard-

less of the form of said plan or program all reports of shipments of milk will not be made until the completion of the month, and shall be made at the same time to all cooperatives and plants participating in said agreements;

provided, however, the terms of this Section X shall not be applicable to any marketing agreement with the Secretary of Agriculture authorized by 7 U.S.C. § 601 *et seq.* relating to a reserve supply of milk in unregulated plants.

XI

Within thirty (30) days after the entry of the Final Judgment, defendant is ordered and directed to withdraw from, and is enjoined and restrained from joining, contributing anything of value to, or from participating in, any organization or association which directly or indirectly engages in or enforces any act which the defendant is prohibited by this Final Judgment from engaging in, or enforcing, or which is contrary to or inconsistent with any provision of this Final Judgment.

XII

(A) The defendant is ordered and directed within ninety (90) days from date of entry of this Final Judgment to amend its By-Laws, Rules, and Regulations by eliminating therefrom any provision which is contrary to or inconsistent with any provision of this Final Judgment.

(B) Upon amendment of its By-Laws, Rules, and Regulations as above said, defendant is thereafter enjoined and restrained from adopting, adhering to, enforcing, or claiming any rights under any By-Law, Rule, or Regulation which is contrary to or inconsistent with any of the provisions of this Final Judgment.

(C) The defendant is ordered to file with the plaintiff annually for a period of ten (10) years on the anni-

versary of the entry of this Final Judgment, a report setting forth the steps taken by the Board to advise its officers, directors, employees, members, and all appropriate committees of its and their obligations under the prohibitions placed upon them by this Final Judgment.

XIII

(A) Defendant is ordered to mail or otherwise furnish within ninety (90) days after the date of entry of this Final Judgment a copy thereof to each of its members and employees, to each hauler transporting milk for defendant, to each processor purchasing milk from or selling milk to defendant or any organization for which defendant acts as marketing agent, and to the cooperative members, officers and employees of Associated Reserve Standby Pool Cooperative, Central Milk Producers Cooperative, Central Milk Sales Agency, and within one hundred fifty (150) days from the aforesaid date of entry to file with the Clerk of this Court an affidavit setting forth the fact and manner of compliance with paragraph XIII.

(B) Defendant is further ordered and directed to mail or otherwise furnish a copy of this Final Judgment to its members once each year for four (4) additional years, and to furnish a copy of this Final Judgment to any person upon request.

XIV

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege:

(a) Duly authorized representatives of the Department of Justice shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant made

to its principal office, be permitted (1) access, during the office hours of defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or in the control of defendant relating to any of the matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant and without restraint or interference from defendant, to interview officers, or employees of defendant, each of whom may have counsel present, regarding any such matters.

(b) Defendant, upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment, as may from time to time be requested.

No information obtained by the means provided in this paragraph XIV shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States of America is party for the purpose of determining or securing compliance with this Final Judgment or as otherwise required by law.

XV

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and direction as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XVI

In accordance with the agreement of the parties, the following agreed order is stated in this new paragraph which has been added to this Final Judgment as originally proposed:

Defendant is enjoined and restrained from accomplishing any reorganization or restructuring of defendant into separate regional or sectional cooperatives unless each such cooperative agrees in writing, filed with the plaintiff and the Court to be bound by the terms of the Final Judgment in *United States* v. *Associated Milk Producers, Inc.*, Civil Action No. 74 CV 70-W-1, entered this day.

/s/ JOHN W. OLIVER
United States District Judge

April 30, 1975

Kansas City, Missouri

(Caption Omitted in Printing)

Supplemental Order Establishing Enforcement and Modification Procedures in Regard to Final Judgment Approved April 30, 1975

Paragraph XV of the Final Judgment entered on the proposed consent decree approved in the above-entitled cause on April 30, 1975, provides:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and direction as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Pursuant to, and in the exercise of the general jurisdiction of this Court and in the exercise of the particular jurisdiction retained by Paragraph XV of the Final Judgment, this Court, on its own motion, finds and concludes that the public interest requires that appropriate procedures for enforcement and modification of that decree be established and provided by formal order of court.

Therefore, and in order to implement the provisions of Paragraph XV of the Final Judgment, it is hereby

Ordered, Adjudged, and Decreed That the following procedures shall be followed in connection with future proceedings which may seek the enforcement and modification of said Final Judgment:

I. Procedure Where Enforcement Is Sought by the United States

Should the United States determine that defendant is not complying with any provision of the Final Judgment,

it shall proceed in accordance with law as provided in Rule 42(b) of the Rules of Criminal Procedure.

II. Procedures Where Enforcement Is Sought Independent of the United States

A. Should any person other than the United States believe that defendant is not complying with provisions of the Final Judgment, such person shall, before making or filing any application for this Court to exercise its independent power and jurisdiction to enforce the Final Judgment, on its own motion, take the following steps:

> 1. Such person shall prepare and serve on the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice an appropriate written request which shall formally pray that the United States file an appropriate petition for enforcement pursuant to paragraph I above.
>
> 2. Said request shall state with particularity: (a) the interest of the person allegedly aggrieved by the defendant's alleged noncompliance with the Final Judgment; (b) the circumstances concerning defendant's alleged noncompliance; (c) the names of persons who allegedly have personal knowledge of those circumstances; and (d) the relief which such person believes the United States should seek in a petition for enforcement which such person believes the United States should file under the circumstances.

B. Such request shall be supported by an appropriate written memorandum which shall include, as separately numbered exhibits, supporting affidavits of persons with personal knowledge of the alleged circumstances and verified copies of any documentary evidence which the allegedly aggrieved person believes may be relevant and material under the circumstances.

C. Such supporting memorandum shall include as an appendix a copy of a petition for enforcement which the

allegedly aggrieved person believes should be filed by the United States.

D. At the time the allegedly aggrieved person serves his request and supporting memorandum on the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, he shall simultaneously transmit information copies of said request and supporting memoranda to the Clerk of this Court and to the judge having jurisdiction over the above-entitled cause.

E. The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall, within twenty (20) days (or within such additional time as the Court may grant) after the receipt of a request from an allegedly aggrieved person, reply to such person in writing. Such reply shall state with particularity: (a) what investigation or other action, if any, will be taken by the Antitrust Division in regard to the request; (b) when such action will be taken; and (c) the reasons supporting the decision of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

F. Information copies of the reply of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall be simultaneously transmitted to the Clerk of this Court and to the judge having jurisdiction over the above entitled cause.

G. In the event the United States as a result of the request, or on its own motion, takes action deemed appropriate by the allegedly aggrieved person, no further proceedings will be necessary under the circumstances.

H. In the event, however, that the United States does not take action deemed to be appropriate by the allegedly aggrieved person, then in that event, and only in that event, such person may so advise the Court in writing and suggest that the Court give appropriate consideration to

whether it should, under the circumstances, exercise its independent power and jurisdiction to direct enforcement proceedings on its own motion.

I. The Court will consider the written suggestion of the allegedly aggrieved person, will review the written request and supporting memorandum presented to the Assistant Attorney General, together with the reply of the Assistant Attorney General, and will thereafter determine what, if any, further appropriate proceedings should be directed under the circumstances.

III. Procedures For Modification of the Final Judgment

Motions for modification of the Final Judgment may be filed only by a party to the case. Any motion for modification shall be filed in accordance with the Rules of Civil Procedure and the Local Rules of this Court.

In the event such a motion is filed, the Court will direct appropriate proceedings under which persons who claim to be aggrieved will be afforded appropriate notice of the proceeding and will be afforded an appropriate opportunity to seek full or limited participation in the proceedings.

/s/ John W. Oliver
United States District Judge

April 30, 1975

Kansas City, Missouri

APPENDIX D

Federal Rules of Civil Procedure 24(a)

INTERVENTION

(a) Intervention of Right. Upon timely application any one shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

APPENDIX E

Antitrust Procedures and Penalties Act

Pub.L. 93-528, 88 Stat. 1706

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by redesignating subsection (b) as (i) and by inserting immediately after subsection (a) the following:

"(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(5) a description of the procedures available for modification of such proposal; and

"(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

"(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

"(i) a summary of the terms of the proposal for the consent judgment,

"(ii) a summary of the competitive impact statement filed under subsection (b),

"(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

"(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the

United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

"(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

"(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

"(f) In making its determination under subsection (e), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of

any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate.

"(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

"(5) take such other action in the public interest as the court may deem appropriate.

"(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the

employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-238

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and ASSOCIATED MILK PRODUCERS, INC., *Respondents.*

OPPOSITION OF ASSOCIATED MILK PRODUCERS, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPPOSITION OF ASSOCIATED MILK PRODUCERS, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Associated Milk Producers, Inc. (hereafter "AMPI") hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit filed by the National Farmers' Organization (hereafter "NFO") in this case.

OPINIONS BELOW

The opinions are reproduced in the petition for a writ of certiorari. (Apps. A, B, C, 1a-67a)[1]

JURISDICTION

The jurisdictional statute is cited in the petition, but there is a failure to meet any of the jurisdictional standards which are required by Supreme Court Rules 19, 23.

QUESTIONS PRESENTED

1. Whether a private treble damage claimant should be allowed to intervene in a government antitrust suit brought against the same defendant and for the same or similar practices involved in the private suit where: (a) a consent decree is proposed in the Government's suit and the proposed intervenor admits that the negotiation and acceptance of it was not subject to bad faith or malfeasance on the part of the government trial staff; (b) no prior court mandate has been ignored or subverted by the Government; and, (c) all of the relief requested in the complaint has been obtained without the necessity of a trial.

2. Whether the District Court's factual determination that the private treble damage claimant failed to show any taint on the negotiation and acceptance of the proposed consent decree and that any evidence it sought to offer would be irrelevant and/or cumulative was clearly erroneous and whether in view of such

[1] Citations to the appendices to the petition identify the specific appendices by the abbreviation "App." and the appropriate letter designations, and state the appendix page numbers. References designated as "R" are to the Appendix filed in the Court of Appeals.

determination it was a clear abuse of discretion for the District Court to refuse to order an evidentiary hearing.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are cited and reproduced in the petition. (Apps. D, E, 68a-73a)

COUNTERSTATEMENT OF THE CASE

As set forth in the petition for writ of certiorari this case involves petitioner's unsuccessful attempt to intervene in a civil antitrust suit brought by the United States against AMPI. Petitioner's declared purpose for intervention is to oppose entry of a consent decree as the final judgment in the case. Petitioner has presented an extremely inaccurate recitation of the facts. Many material facts have been ignored and misstated and the relevant opinions below have been distorted.[2] It is therefore necessary to provide the court with a more complete and accurate statement of the facts. The respondent AMPI supplements and corrects petitioner's Statement of the Case as follows:

1. Nature of the Case

The petitioner seeks review of an order of the Western District of Missouri denying its motion to intervene in an antitrust action brought by the United States against AMPI. (App. C) The United States instituted this civil antitrust action on February 1, 1972, in the Western District of Texas. In mid-1972, discovery was coordinated with the Midwest Milk Monopolization Litigation, JPML Docket No. 83 pend-

[2] Supreme Court Rule 23 provides that inaccuracy is itself sufficient reason to deny the petition.

ing in the United States District Court for the Western District of Missouri, and for all practical purposes proceedings in the case were directed by that Court from that time on. Subsequently, in February 1974, the suit was formally transferred to the Western District of Missouri.

Respondent AMPI is an agricultural cooperative marketing association,[3] organized and existing under the laws of Kansas. The members of AMPI are individual dairy farmers. Petitioner NFO is an agricultural organization incorporated under Iowa laws which has filed and is presently prosecuting a private antitrust action against AMPI alleging injury as a competitor. AMPI has counterclaimed against NFO. Both of these claims, along with others,[4] are included in JPML Docket No. 83.

On April 30, 1975, the district court entered a final consent judgment in the government suit against AMPI. On April 16, 1976 the United States Court of Appeals for the Eighth Circuit unanimously affirmed the district court. (App. A) Subsequently, on May 19, 1976, the Eighth Circuit denied NFO's petition for rehearing. (App. B)

2. The Course of the Negotiations

After the United States filed this civil antitrust action against AMPI on February 1, 1972, there were some early negotiations between the two parties regarding possible settlement of the case by consent.

[3] An agricultural cooperative marketing association is defined in the Capper-Volstead Act, 7 U.S.C. § 291 (1970).

[4] Alexander v. NFO, Civil Action No. 19191-1, Western District of Missouri.

These negotiations failed to result in an agreement, and discussions terminated in March or April, 1973. In January, 1974, with different counsel representing AMPI, the parties began serious settlement negotiations which were different in character from the earlier talks. (R. 698) It was these later discussions that resulted in the proposed consent decree, which was filed with the district court on August 13, 1974.[5] (R. 698, 198)

The earlier contacts which are exclusively relied upon by petitioner to support its claim for intervention occurred entirely prior to 1974 and in time substantially prior to the initiation of negotiations which led to the consent decree. These contacts were found by the district court not to be relevant to the then pending consent decree proposal. Although petitioner relies extensively on the Final Report of the Select Committee on Presidential Campaign Activities of the United States Senate it fails to quote the crucial find-

[5] A review of the petition discloses that petitioner has not, nor is it able to, point to any contacts between representatives of AMPI and government officials with respect to the consent decree negotiations, subsequent to January, 1974, which even remotely can be labelled a "suggestive contact." (Pet. 8-15) Moreover, the Government has admitted on the record that (1) a thorough investigation failed to establish any evidence that anyone in the Antitrust Division acted improperly with respect to AMPI both before and after the case was filed; (2) the Antitrust Division trial staff and their superiors unanimously approved the consent decree; (3) the decree was negotiated solely by Antitrust Division personnel and AMPI counsel; and (4) except for comments of third parties received by the district court and technical advice from the Department of Agriculture "no person outside the Antitrust Division was consulted by the Antitrust Division about terms to be included or omitted from the proposed consent decree." (R. 471)

ing in the Report which refutes its argument: "[T]here is no evidence that Kalmbach or any White House official intervened in the antitrust suit thereafter [referring to April, 1972]." (R. Ex. B. 729) [6] Additionally, while all of the references to the contacts relied on by petitioner have been fully aired and inquired into, and were available to the courts below, there has never been any suggestion of any improper influences upon the consent decree proposed on August 13, 1974. In fact, petitioner has itself stated on the record that it does not in any way contend that Government counsel conducted themselves improperly in the negotiation of the decree or in the presentation of the proposed decree to the district court. (R. 374, 479-480)

3. Proceedings Regarding the Proposed Decree

Shortly after August 13, 1974, when the United States and AMPI filed the consent decree with the district court, a pretrial proceeding was held in the Midwest Milk cases at which time a schedule was prepared for the orderly submission of third party comments, suggestions, and objections to the proposed decree, designed to aid the court in determining whether the consent decree would serve the public interest. (R. 200-202) Under this schedule, third parties were invited to identify their objections or requests for explanation regarding either specific parts

[6] The Senate Report, after reviewing the entirety of the evidence on political contributions and the antitrust suit filed by the Government, was unable to conclude that there was anything improper in the manner by which the Justice Department handled the case. In fact, there are numerous references to facts which demonstrate a lack of outside influence on the suit and a "vigorous prosecution" on the part of the Government. (R. Ex. B. 729 n.57, 732-733, 733 n 83).

or the entirety of the proposed decree. After these initial comments, the Government and AMPI were to consider and respond to the questions and comments received. During the second "phase" of the schedule, any third party who desired to comment was invited to file a written response, including but not limited to motions to intervene pursuant to Rule 24, Fed. R. Civ. P., or statements of *amicus curiae* appearance. Following written response by the Government and AMPI, another court hearing was planned at which further argument regarding the third parties' positions would be heard, and any necessary future proceedings would be scheduled.

Under this procedure, a large number of extensive comments and suggestions were filed by third parties, including third parties who are not parties to any suit pending in JPML Docket 83. (*See, e.g.*, R. 241, 243) The United States then filed a 98-page response, explaining in detail the objectives achieved by each provision of the proposed decree and the reasons for the selection of the particular mode of relief, as well as an appendix which demonstrated that the proposed decree enjoined the specific acts alleged in its complaint. (R 250-351) Copies of all documents were mailed to all parties to the private litigation and to all others whom the government thought might be interested. The government also made available to the district court and to any other persons requesting it the massive economic study on which it based its economic analysis. (R. Ex. A). The district court received further comments, bringing the number of those filing comments to eight parties to the private litigation and seven other parties. (R. 203-245, 247-249, 410-462, 615-626, 646-654)

It is clear that, from the beginning, petitioner objected to the entry of not just this particular proposed decree but *any* consent decree. In its "phase I" comment on the proposed decree petitioner asked, "[w]hy should *any* consent decree between AMPI and the Government be approved . . ." and called for a "full public trial" which would result in a litigated judgment having *prima facie* effect. (R. 213) [7] (emphasis added) In "phase II" of the scheduled procedures, petitioner filed its motion to intervene and detailed its objections to the decree. (R. 364-365, 391-409) After the Government and AMPI filed a response in opposition (*see, e.g.*, R. 464) a hearing was held at which time third parties were given the opportunity to exhaustively argue their positions to the district court. (R. 477-600) [8] The court deferred

[7] In a pretrial proceeding held in the Midwest Milk Monopolization Litigation, NFO counsel stated his interest in conserving his client's money by the Government carrying its case to a litigated conclusion. (Tr. of Proceedings, JPML Docket 83, July 31, 1974, at 192). This is not an appropriate justification for granting intervention. *See, e.g.*, Securities and Exchange Comm'n v. Everest Mgt. Corp., 475 F.2d 1236, 1239 (2d Cir. 1972).

[8] At this hearing, in response to a specific request from the court, the only evidence which petitioner offered to produce at an evidentiary hearing was the witnesses whose testimony was reflected in the Senate Watergate Report, which would be cumulative to the Report itself, and the testimony and files of Richard M. Nixon and his presidential tapes, which the court found would be wholly irrelevant to the consent decree proposed and negotiated in January, 1974 and which would possibly be subject to a claim of executive privilege. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975); Nixon v. Administrator of General Services, 408 F. Supp. 321 (D.D.C. 1976). (R. 481-493) Moreover, although invited to, petitioner made no effort to question counsel for the Government on the record concerning the terms of the consent decree. (R 556-600)

ruling on petitioner's motion, along with several other motions for intervention, pending consideration of the advisability of holding an evidentiary hearing on the consent decree. (R. 495)

In the interim, on December 21, 1974, the Antitrust Procedures and Penalties Act [9] (hereafter "APPA") was enacted into law. Although the procedures already ordered by the district court adequately complied with the new Act's requirements for publication of the decree and a competitive impact statement, and the response to third-party comments by the parties (sections 2(b)-2(d)), the district court asked AMPI to file a 2(g) statement of contracts.[10] On February 21, 1975, AMPI voluntarily filed a statement covering the period during which the proposed decree was negotiated.[11] (R. 673) On March 28, 1975, acting pursuant to court request, the United States submitted a brief additional list of AMPI contacts with the Antitrust Division between the filing date of the suit and the start of the settlement negotiations. (R. 686) On April 9, 1975, AMPI filed a list of governmental contacts for the same period. (R. 698)

On April 30, 1975, the district court entered the consent decree. (App. C. 47a) In an accompanying Memorandum and Order, in which the court articulated

[9] Pub. L. 93-528, 88 Stat. 1706, 15 U.S.C.A. § 16(b)-(g) (Supp. 1, 1975).

[10] AMPI at that time denied that the new Act was applicable to a consent decree proposed prior to the enactment of the new law (R. 659-671) and continues to so argue.

[11] AMPI argued to the district court and continues to maintain here that Section 2(g) applies only to the proposed consent decree filed by the parties.

the meticulous scrutiny to which the decree was subjected, the proposed consent judgment was approved as being in the public interest. (App. C. 13a) Since the court found that the Government's attorneys had been uninfluenced by outside political pressure and had proposed and negotiated the decree in good faith and without malfeasance (App. C. 30a) petitioner's motion for intervention was denied. This was unanimously affirmed by the United States Court of Appeals for the Eighth Circuit. (App. A)

4. The Opinions of the Lower Courts

A. The District Court

Petitioner contends that the writ should be granted due to a confusion in the law. (Pet. 28-32) Yet the only confusion evidenced by the petition results from its mischaracterization of the opinions of the courts below; not from court decisions on the same question.

Initially, petitioner states that the first two elements of Rule 24(a)(2), F.R.Civ.P.—interest and practical impairment or impediment—are not at issue in this case. (Pet. 6) The district court reached the contrary conclusion, however, holding that petitioner had failed to meet either of these two tests. As a member of the public and as a private treble damage claimant, petitioner lacks the appropriate interest to enable it to intervene as a matter of right. (App. C. 36a) Furthermore, since petitioner argued only that more stringent relief should have been included in the consent decree and is not "foreclosed from urging that view in the private litigation," its alleged interest has not been impaired or impeded. (App. C. 40a) It is, therefore, indisputable that the district court found

petitioner to have failed to meet this burden under Rule 24.[12]

Contrary to petitioner's characterization (Pet. 20-25), the district court's opinion clearly and precisely explained why inadequate representation had not been shown.[13] Petitioner's argument on this point was based on its claim that "the Government in its entirety and in those reaches of the Government inaccessible to counsel who represent it here have . . . made a deal." (App. C, 23a) Petitioner declined, however, to question the government attorneys as to the relief contained in the consent decree, and when asked what additional information it possessed to support its claims it offered only information already available for the court's inspection and/or which was irrelevant since it related to a period of time at least a year prior to the commencement of negotiations for the proposed consent decree. (App. C, 19a, 23a-26a) On the basis of this information and utilizing the standards set

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[12] The court of appeals clearly recognized the district court's holding that, except for timeliness, petitioner failed to satisfy any of the requirements of Rule 24(a)(2). (App. A, 6a)

[13] Petitioner's contention that the burden is on the existing party to prove adequate representation by the government is in direct contrast to the opinions of this Court. *See* Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). *Cf.* New Jersey v. New York, 345 U.S. 369 (1953). The lower courts are in virtual agreement that the burden of establishing inadequate representation remains on the proposed intervenor. *See, e.g.*, Blanchard v. Johnson, 532 F.2d 1074, 1077 (6th Cir. 1976); Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters Local, 520 F.2d 352, 355 (2d Cir. 1975); Reedsburg Bank v. Apollo, 508 F.2d 995, 997-998 (7th Cir. 1975); Edmondson v. State of Nebraska ex rel. Meyer, 383 F.2d 123, 127 (8th Cir. 1967).

forth in *Sam Fox Publishing Co., Inc.* v. *United States,* 366 U.S. 683 (1961), the district court found as a matter of fact that due to petitioner's failure or inability to "indicate with any degree of particularity" whether it had any "claim" or evidence that members of the Antitrust Division were improperly influenced by AMPI, it would not accept the argument that "where there is smoke, there must be fire." The court added that

> [w]e are confident that so far as the personnel of the Antitrust Division of the Department of Justice involved in the actual negotiation of the pending proposed consent decree are concerned, all such persons were uninfluenced by outside political pressure and that the proposed consent decree was in fact negotiated in good faith and without malfeasance on the part of the representatives of the United States who in fact negotiated and proposed the consent decree. We so find. (App. C, 30a)[14]

Petitioner was therefore adequately informed by the court of the basis and reasons for the denial of its motion to intervene.

The APPA was enacted into law subsequent to the time the consent decree was filed with the court and the implementation of scheduled procedures to aid the court to determine whether it should be entered as the final judgment in the case. AMPI consistently argued that this new statute could not be applied retroactively

[14] Commenting on the material upon which petitioner relied to support its right to intervene, the court noted that "[t]hat data, in our judgment, does not support NFO's suggestion that corruption was at work in the formulation of the consent decree proposed in this case." (App. C. 26a)

to a consent decree which had previously been proposed.[15] Without determining the applicability of the Act, the district court found that the extensive procedures implemented in this case substantially and adequately complied with the new requirements. (App. C, 14a, 18a, 21a, 22a n.6, 30a)

Petitioner does not contend that Sections 2(b), (c), (d) and (f) of the APPA have not been complied with. Indeed, based upon the requirements imposed by the district court for publishing the decree and permitting third parties to comment thereon, it is clear that these sections were anticipated and complied with even before the passage of the Act. The district court so held. (App. C, 18a, 19a-20a n.5)

Contrary to petitioner's argument (Pet. 23-24), the district court applied the correct legal principles under Section 2(e) of the APPA which codified existing law and practice requiring that the district court must

[15] This is clear from the wording of the statute itself. A defendant's contacts must be filed under Section 2(g) "[n]ot later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) . . . ." Unless the consent judgment proposed was submitted under 2(b) of the Act, the requirement of filing a statement of communications, which is the principal error in applying the APPA of which petitioner complains, does not apply. The Act became law in December, 1974, long after the consent judgment had been filed with the district court. Therefore, the proposed consent decree which was filed on August 13, 1974 could not have been filed under 2(b) because the Act was not yet law. Furthermore, an amendment to this bill in Congress, which would have specifically provided retroactive effect for the Act, was never enacted. *See* H.R. 9947, 93d Cong., 1st Sess. (1973). This clearly demonstrates the inapplicability of the APPA to the consent decree proposed in this case.

make an independent determination that the consent decree is in the public interest. The court was well aware of its obligation to determine that the consent decree was in the public interest. (R. 536) Rather than acting as a "rubber stamp" the court indicated its dissatisfaction with the manner in which the proposed consent decree had been presented and required "procedures consistent with full illumination in an orderly manner," with specific references to provisions of the APPA. (App. C, 16a)[16] Instead of accepting the first consent decree proposed by the parties the court specifically noted its disapproval of various portions and advised modification of these provisions which was complied with. (App. C, 31a) Finally, the court explicitly and independently found the entry of the proposed consent decree to be in the public interest, while recognizing the existing discretionary power of the Attorney General to enter into such agreements. (App. C, 38a-41a)

That Section 2(e) of the Act merely codified existing law with respect to approving consent decrees is evident from the legislative history of that Act. Congressman Seiberling stated that:

> *Under the existing law,* courts, before approving a consent decree, are supposed to consider whether the decree is in the public interest, and not merely to "rubberstamp" an agreement that has been arrived at between the Department of Justice and

[16] The court never expressed its concern that the decree might be a "last dividend," as petitioner would have this Court believe. (Pet. 21-22) Rather, the court insisted upon procedures to ferret out whether such a charge could justifiably be made, and after all information had been analyzed concluded it could not. (App. C. 16a)

> the particular defendants. 119 Cong. Rec. H10762 (daily ed., 11/19/74).[17] (emphasis added)

District court judges have traditionally sought to avoid the label of being a "rubber stamp" for the Department of Justice in consent decree proceedings. *United States* v. *CIBA Corp.,* 50 F.R.D. 507, 514 (S.D. N.Y. 1970). Furthermore, courts have correctly recognized their nonpassive role in approving consent decrees.[18] The district court in this case was therefore correct in stating that Section 2(e) is "an accurate codification of existing case law." (App. C, 39a) Therefore, in finding and concluding that "it would not be in the public interest to reject the proposed consent decree," the district court properly complied with Section 2(e) of the APPA. (App. C, 41a)

Section 2(g) of the APPA requires that the defendant file a statement of its contacts with the government concerning or relevant to the specific proposed consent decree filed by the parties. The words "such proposal" in that section clearly refer back to Section 2(b)'s language regarding the "proposal for consent judgment . . . [which] shall be filed." Of course, the proposal referred to is the proposed consent judgment

[17] This view was also expressed in hearings on the bill by Judge Skelly Wright and former Assistant Attorney General Donald Turner. *See* Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess., (1973), at 147-148, 192.

[18] *See generally* Pope v. United States, 323 U.S. 1, 12 (1944); Esco Corp. v. United States, 340 F.2d 1000, 1005 (9th Cir. 1965); United States v. International Telephone and Telegraph Corp., 349 F.Supp. 22, 25-26 n.2 (D.Conn. 1972), *aff'd per curiam sub* nom., Nader v. United States, 410 U.S. 919 (1973); United States v. Ling-Temco-Vought, Inc., 315 F.Supp. 1301, 1308, 1309 (W.D. Pa. 1970); United States v. F. & M. Schaefer Brewing Co., 1968 Trade Cases ¶ 72,345 (E.D. N.Y. 1967).

which was filed with the district court. No discussion or contacts took place between personnel of the Antitrust Division who negotiated the decree and anyone purporting to act on behalf of AMPI relating to the consent decree which are not listed in the description of contacts filed by AMPI. The district court, therefore, appropriately rejected petitioner's argument that Section 2(g) covered "*all* political activities and *all* lobbying contracts." (App. C. 30a) [19] (emphasis in orginal)

Finally, the court refused to grant an evidentiary hearing because the material petitioner sought to adduce at such a hearing was "either uncontroverted or clearly irrelevant and immaterial to any issue before the Court" and it failed to "indicate with any degree of particularity" the claim made. (App. C. 19a, 30a)

B. The Court of Appeals

The decision of the court of appeals unanimously affirmed the district court on the denial of intervention. It held that since the Attorney General must retain discretion to control the government's litigation, the intervention standard of showing "' [B]ad faith or malfeasance on the part of the Government' in negotiating and accepting a consent decree . . . ." should be retained. (App. A. 9a) [20] Recognizing that petitioner did not question the good faith of the trial staff who negotiated and accepted the decree, that the malfeasance of which NFO complained related solely to the commencement of the case, and that petitioner was given an opportunity to submit extensive information and question the Government attorneys about the decree, the court held that the district court's decision that the Government attorneys acted in good faith and adequately protected the public interest by the decree was correct. (App. A. 9a-10a) [21]

[19] Since the only contacts petitioner claims to have been omitted by AMPI were already on the public record, the statement of contacts fully complied with the purposes behind the requirements in the new statute and the district court did not abuse its discretion in denying intervention and approving the consent decree. *See* Scenic Hudson Preservation Conf. v. F.P.C., 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). *See also* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). Contrary to petitioner's allegation (Pet. 21) the court did not reject AMPI's 2(g) filing as a model for the future but rather did not make a determination on that issue. (App. C. 29a)

Reasons for Denying the Writ

Respondent submits that the petition presents no special or important reason which would make it proper to grant a writ of certiorari. There is no conflict among the circuit courts of appeals or district courts with respect to the issues herein and no statute or case law has been construed in contravention of this Court's decrees. The result reached below does not turn on any unsettled federal questions. Rather, the courts below invoked well-settled judicial and statutory principles and correctly applied them to the particular factual situation presented in this case. The

[20] The court of appeals correctly followed the many cases which have interpreted Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) as being *sui generis* and inapplicable to this case. (App. A. 9a n.4)

[21] Contrary to petitioner's Statement of the Case, the court of appeals made reference both to the APPA and an evidentiary hearing. (App. A. 3a n.1, 11a) The court of appeals denied a petition for rehearing. On its own motion, the court amended its opinion to state that petitioner did not question the good faith of those government attorneys who negotiated the decree but only "unnamed high government officials." (App. B. 12a)

decisions of the courts below are wholly consistent with the law and the appropriate exercise of judicial discretion. Finally, the question of whether factual findings are supported by the evidence does not present a proper question for the granting of the Writ.

I. The Petition Presents No Important Question of Federal Law, or Conflict Among the Circuits or Conflict with the Decisions of This Court

The primary reason submitted by petitioner for granting the writ is the "resulting confusion" in the law due to a lack of Supreme Court precedents to serve as guidelines. (Pet. 28-32) Petitioner raises the specter of a multitude of irrational lower court decisions and the lack of guidance from this Court. To the contrary, however, the decisions of the Supreme Court and the lower court interpretations thereof are surprisingly clear and consistent in an area which is so fraught with factual distinctions. Virtually every court which has considered the question of a private treble damage litigant's right to intervene in a government antitrust proceeding has refused to allow such intervention. This is undoubtedly in recognition of this Court's well-settled rule that in federal antitrust litigation it is the United States "which must alone speak for the public interest." *Buckeye Coal & Railway Co.* v. *Hocking Valley Railway Co.*, 269 U.S. 42, 49 (1925).

If a party wishes to protect its own narrow private interests it can appropriately do so in a private treble damage action and remain unfettered by the Government's separate litigation. This Court has consistently recognized that

> [i]t is the Attorney General and the United States district attorneys who are primarily charged by

> Congress with the duty of protecting the public interest under these [antitrust] laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

Allowing any private party to intervene in a government antitrust proceeding merely by showing a disagreement with the terms of the consent decree based on its own individual concerns would not serve the overall public interest for it would encourage the injection of multiple competitive interests in each consent decree proceeding and would hamper the coordination of government antitrust policy. Avoidance of such chaos and the desire for a consistent government antitrust policy necessitate a standard of inadequate representation different in kind from that used in wholly private litigation.[22]

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[22] Since the amendment of Rule 24, F.R. Civ. P., in 1966, courts have tended to allow intervention in wholly private controversies in situations where the proposed intervenor could demonstrate inadequate representation through a non-identity or antagonism of interests. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909 (1972). In antitrust actions brought by the Government, however, courts have denied intervention to those desiring to assert a private interest, particularly if they were capable of bringing, or had already brought, private treble damage actions. *See e.g.*, United States v. Automobile Mfrs' Ass'n, Inc., 307 F.Supp. 617, 619 (C.D. Cal. 1969), *aff'd per curiam sub nom.*, City of New York v. United States, 397 U.S. 248 (1970); United States v. Blue Chip Stamp Co., 272 F.Supp. 432, 440 (C.D. Cal. 1967), *aff'd per curiam sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968).

The Supreme Court has met this need by establishing a general rule that courts will not second guess the government's public interest judgment in settling a case by enabling a private party to intervene to assert an interest antagonistic to the defendant. In *Sam Fox Publishing Co., Inc.* v. *United States,* 366 U.S. 683 (1961) the Court affirmed the district court's denial of intervention in a consent judgment proceeding to private parties who alleged that various provisions of the decree were not in the public interest.[23] The Court clearly stated that:

> [a]part from anything else, sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. 366 U.S. at 689.

In this manner the Court recognized that Congress has vested in the Government the duty to protect the public interest and that a disagreement with the wisdom of the United States' decision to settle one of its suits does not indicate inadequate representation of the public interest. As the Court has previously stated in a case concerning judicial review of the Attorney General's discretion with respect to consent decrees, "[h]is authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Swift and Co.* v. *United States,* 276 U.S. 311,

[23] The Court, interpreting the pre-1966 version of Rule 24(a)(3), also held that the petitioner had failed to make the requisite showing that it would be bound by the result of the suit were intervention not allowed.

331-332 (1928). Therefore, only an egregious failure on the part of the government to fulfill its role as protector of the public interest in antitrust matters, with bad faith or malfeasance constituting evidence of this failure, will enable some other person, capable of representing the public interest, to fill the void.[24]

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), contrary to petitioner's contention (Pet. 29-30), did serve to clarify the standard for intervention by private parties in government antitrust consent decree proceedings. It firmly established that *Sam Fox* required outrageous conduct on the part of the government in accepting a consent decree of such a nature that it could be assumed the government was acting without authority and failing to perform its duty.[25]

[24] In Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), the only case in which the Supreme Court has approved intervention in these circumstances, the State of California was placed in the role of protecting the public interest.

[25] These decisions reflect the Court's recognition that a private party should obtain no greater rights to influence the conduct of the government's case through intervention than it would through relief in the nature of mandamus. Under the latter approach, a party can compel a government official to perform a discretionary act but has no control over how such discretion is to be exercised. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-219 (1930) Likewise if, in an antitrust case, the government acts in such a manner that it is failing to perform its discretionary duty, *Sam Fox* and *Cascade* would permit intervention. Where the only showing, however, is a disagreeemnt with how the government has exercised its discretion, as in this case, intervention should be denied.

Cascade involved exceptional facts[26] which demonstrated an abdication by the government of its role of negotiating consent decrees in the public interest through its disobedience to a court order. In that case the Government sought to enjoin the acquisition by El Paso Natural Gas of Pacific Northwest Pipeline as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970). After lengthy litigation resulting in a full trial on the merits the Supreme Court found an antitrust violation and ordered "divestiture without delay." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The Department of Justice and defendant agreed on the provisions of the divestiture decree which was then approved by the district court.[27] On appeal the Supreme Court held that intervention of right by the State of California and others should have been granted in the proceedings on remand from its prior order because the government had "knuckled under" to El Paso and had failed for three years to carry out the Court's mandate for "divestiture without delay." 386 U.S. at 136, 141.

The holding of *Cascade* was clearly limited to the distinct factual circumstances presented by that case.

[26] Even petitioner has admitted this by its reference to *Cascade* as representing "the exceptional case doctrine." (R. 474, 492) This is further illustrated by the fact that *Cascade* is the only case where the Supreme Court required intervention in a government antitrust case involving a consent decree by a person capable of protecting the integrity of its mandate. The lower courts have also recognized this factor of *Cascade*. *See* App. A. 9a n.4. *See also* United States v. Automobile Mfrs' Ass'n, Inc., 307 F.Supp. 617, 619 n.3 (C.D. Cal. 1969), *aff'd per curiam sub nom.*, City of New York v. United States, 397 U.S. 248 (1970).

[27] The decree provided for gradual divestiture and failed to insure that the new company would be a competitive factor in the market. 386 U.S. at 131, 136-140.

While reiterating the authority of the Attorney General to settle antitrust suits, the Court held that

> [t]he Department of Justice . . . has *no authority* to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate . . . . Our direction was that the District Court provide for "divestiture without delay." That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market. 386 U.S. at 136. (emphasis added)

The fact that the Supreme Court had previously found an antitrust violation after a full trial, had ordered immediate divestiture of the El Paso acquisition, and the Court's view that the new decree submitted by the Department of Justice subverted its prior mandate, was therefore crucial to the grant of intervention in that case.[28] As in *Sam Fox*, the Court expressed the rule that intervention is appropriate in government antitrust proceedings only where the government has "no authority" to act in a particular manner, *e.g.*, corruptly or in disregard of a court order. After a searching examination of the facts submitted by all interested parties, the district court in this case appropriately applied this well-settled standard and found that the government had acted in good faith and within its discretion in negotiating and accepting the consent decree. (App. C, 30a, 41a)[29]

[28] This is particularly true when viewed in the context that it was the only method by which the Court could exercise control over its decree in circumstances where the Department of Justice had compromised its mandate.

[29] In addition, the court made the independent finding that the entry of the decree itself would benefit the public interest, as is required by the APPA. (App. C. 41a)

Further evidence that there is no need for additional guidance by the Supreme Court in this area is supplied by the consistent denial of intervention by the federal courts to parties who seek to complain about the exercise of discretion by the Attorney General but who cannot make a showing that he acted without authority or failed to perform his function.[30] The continued affirmance of this type of case by the Supreme Court should provide more than adequate advice concerning the appropriate standards for intervention in consent decree proceedings in government antitrust cases[31] and review here would therefore be unnecessary. Only two lower federal courts have issued reported decisions allowing private parties to intervene in antitrust consent decree proceedings and both are consistent with *Cascade*.[32]

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[30] *See, e.g.*, United States v. International Telephone and Telegraph Corp., 349 F.Supp. 22 (D. Conn. 1972), *aff'd per curiam sub nom.*, Nader v. United States, 410 U.S. 919 (1973); United States v. CIBA Corp., 50 F.R.D. 507 (S.D. N.Y. 1970); United States v. National Bank and Trust Co. of Central Pa., 319 F.Supp. 930 (E.D. Pa. 1970); United States v. Automobile Mfrs' Ass'n, Inc., 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.*, City of New York v. United States, 397 U.S. 248 (1970); United States v. Western Electric Co., Inc., 1968 Trade Cases ¶ 72,415 (D. N.J.), *aff'd per curiam sub nom.*, Clark Walter & Sons, Inc. v. United States, 392 U.S. 659 (1968); United States v. Blue Chip Stamp Co., 272 F.Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968).

[31] A summary affirmance by the Supreme Court is entitled to precedential effect. Edelman v. Jordan, 415 U.S. 651, 671 (1974).

[32] In United States v. First National Bank and Trust Co. of Lexington, Ky., 280 F.Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom.*, Central Bank & Trust Co. v. United States, 391 U.S. 469 (1968) the court held that Cascade was "directly in point." 280 F.Supp. at 263. This was due to the government's "ninety percent capitulation" in the relief requested in the consent decree in the face of a prior court order requiring divestiture. *Id.* In United States v. Simmonds Precision Products, Inc., 319 F.Supp. 620 (S.D. N.Y. 1970) the district court issued a preliminary injunction in a merger case requiring preservation of the acquired company as a "going concern." The Government, however, entered into a consent decree which permitted "piecemeal" divestiture. These cases represent instances where the Government failed to comply with a prior court order as in *Cascade*. Moreover, in *Simmonds* intervention was not sought by a private treble damage claimant but by a union and its members who were interested in preserving their employment with the merged company. The Department of Justice in the negotiating of consent decrees is concerned with questions bearing on competition and does not usually focus on employment rights. It is therefore necessary for a court, through intervention, to consider factors necessary for the protection of such particularized interests of the parties who would ordinarily not be able to pursue their interests through a private treble damage action.

Finally, no conflict exists on this issue among the courts of appeals. In fact, the decision below by the Eighth Circuit is the first and only federal appellate court opinion to consider the propriety of intervention in a government antitrust case. As a result of the recent amendments to the Expediting Act embodied in Section 4 of the APPA, 15 U.S.C.A. § 29 (Supp. I, 1975) the appellate courts will play a greater role in the formulation of antitrust law and it is inadvisable and unnecessary for this Court to presently concern itself with this issue.

II. The Courts Below Correctly Held that Petitioner Failed To Meet Its Burden To Justify Intervention or an Evidentiary Hearing

Relying on the well-established standard for intervention in government antitrust proceedings which was promulgated by the Supreme Court and applied by lower courts, the district court concluded that the evidence produced and proffered by petitioner failed

to support the bald assertion that the formulation of the consent decree was influenced by corruption. (App. C. 26a) Additionally, the court determined that the government personnel who had negotiated the decree acted "in good faith and without malfeasance." (App. C. 30a) The district court reached this conclusion after conducting extensive hearings on the propriety of the proposed decree, allowing the parties to comment upon and even question the government attorney in charge of the case about the decree, and carefully assessing this information together with petitioner's statement that it does not question the integrity of the government attorneys who negotiated and accepted the decree. (App. C. 23a) The court of appeals affirmed the determination by the district court that the evidence upon which petitioner relied was pertinent, if at all, only to the commencement of the case, and irrelevant to the negotiation or acceptance of the consent decree. (App. A. 9a)

The court of appeals did not, as petitioner suggests, require "a conclusive showing" that the Government acted corruptly with respect to the consent decree. (Pet. 34) To the contrary, the court merely affirmed the factual determination by the district court that petitioner had failed to raise even a presumption of a link between allegations of corruption in the inception of the case to bad faith in negotiating and accepting the decree. (App. A. 10a) [33]

[33] This is consistent with the holding of the court which reviewed the settlement of the government's antitrust case against ITT. As the court there noted:

> *Amici* are more interested in conjecture, speculation and hypothesis about the possible existence of motive on the part of Mr. Mitchell, who was Attorney General when the settlement was effected; they purport, by a particularly clumsy form of logical legerdemain, to turn tentative guesses into established facts. It does not matter what the motives of then Attorney General Mitchell may have been. *No evidence has been offered to show that he exercised any influence on the settlement.* United States v. International Telephone and Telegraph Corp., 1974 Trade Cases ¶ 74,872, at p. 95,868 (D.Conn. 1974). (emphasis added)

Additionally, the court of appeals independently found that the facts surrounding the decree did not supply by implication the link of corruption in the inception of the case to the decree itself, as petitioner argued. First, the court noted that, contrary to the *Cascade* situation, the government in this case obtained essentially all of the relief through settlement which it sought in the complaint. Second, the failure to request the remedy of divestiture in the complaint was not peculiar or inadequate. Where agricultural cooperatives are involved in a monopolization case based upon improper practices, such as this one, divestiture is ordinarily not the appropriate remedy.[34] Further-

[34] Petitioner cites United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 329 (1961), for the proposition that dissolution or divestiture "is traditionally and presumptively required in monopolization cases." (Pet. 15) The Court, however, stated that this was the remedy for violations "whose heart is intercorporate combination and control." *Id.* Principles developed in cases involving traditional corporate forms do not necessarily apply to agricultural cooperatives, where the production of the commodity sold is owned by each of a large number of farmers, rather than the cooperative itself. United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 562 (1939). The "[d]ifferences that permit substantive differentiations also permit differentiations of remedy." Tigner v. Texas, 310 U.S. 141, 149 (1940). Moreover, *du Pont* involved a litigated judgment, not a consent judgment, and it has been recognized that "where a consent decree, rather than a litigated judgment, is entered," the relief need not include divestiture. United States v. Blue Chip Stamp Co., 272 F.Supp. 432, 440 (C.D. Cal. 1967), *aff'd per curiam sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968). Finally, the possible inability of petitioner to obtain divestiture in a private antitrust suit does not result from any action taken by the Government in this case.

more, the government established that dissolution would be contrary to the public interest. (App. A. 10a) Petitioner's argument that conclusive proof was established as a standard for intervention is therefore erroneous.

The weakness of petitioner's argument becomes apparent by its reliance upon *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972), as establishing a different standard than that used for showing inadequate representation in a government antitrust case. *Trbovich* involved a motion to intervene by a union member in litigation brought by the Secretary of Labor to set aside an election of union officers under Title IV of the Labor-Management Reporting and Disclosure Act. Under that legislation a union member was not granted the right to bring an independent private court action to enforce its provisions. Pursuant to the statutory scheme, the Secretary of Labor has the obligation to protect both the public interest in free and democratic union elections and the individual union member's rights against his union and he " 'in effect becomes the union member's lawyer' for purposes of enforcing . . . [the union members'] rights." *Id.* at 539. Therefore, "[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.' " *Id.*

It is not surprising that the Court has possibly recognized a lesser burden of showing inadequate representation in the *Trbovich* situation than in a government antitrust case. Under the antitrust laws, a private individual has a right to bring an independent antitrust suit for treble damages which is not limited

in any respect by the government's action.[35] Moreover, the Government brings its cases solely on behalf of the general public, while private parties are able to pursue their own personal interests through treble damage actions. Therefore, unlike the situation which confronted the Court in *Trbovich,* the Government does not act as the lawyer for private parties.[36] The "private and public actions were designed to be cumulative, not mutually exclusive . . . . 'Different policy considerations govern each of these.' " *United States* v. *Borden Co.,* 347 U.S. 514, 518-519 (1954).

Although the lower courts did not require a conclusive showing, they did recognize that merely an unsupported "claim" of inadequate representation is insufficient to justify intervention by a private treble damage claimant in a government antitrust proceeding.[37] This is based upon the principle that where the government is prosecuting or defending a legal matter

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[35] Section 4 of the Sherman Act, 15 U.S.C. § 15 (1970); Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 690 (1961); United States v. City of Jackson, Mississippi, 519 F.2d 1147, 1151 (5th Cir. 1975); Battle v. Liberty National Life Insurance Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110 (1975).

[36] This interpretation of *Trbovich* has been adopted by the federal courts. *See, e.g.,* United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 845 n.21 (5th Cir. 1975), *cert. denied,* — U.S. —, 96 S.Ct. 1684 (4/19/76).

[37] Indeed, the district court found that petitioner failed to adequately inform the court whether it even had a "claim" that the consent decree negotiations had been tainted. (App. C. 30a) Moreover, since petitioner itself states that "the mere claim of possible wrongdoing should not be sufficient to trigger a hearing requirement" (Pet. 38), *a fortiori* merely a "claim" of inadequate representation such as is made by petitioner is insufficient to justify intervention.

there is a "presumption" of adequate representation of the public interest, which does not exist in a purely private controversy.[38] The courts have, therefore, held that to overcome this presumption "to justify intervention [in a government antitrust proceeding], the allegedly inadequate representation by the Justice Department must be 'shown clearly.'" *United States* v. *International Telephone and Telegraph Corp.*, 349 F. Supp. 22, 27, 27 n.4 (D. Conn. 1972), *aff'd per curiam sub nom., Nader* v. *United States*, 410 U.S. 919 (1973); *United States* v. *CIBA Corp.*, 50 F.R.D. 507, 513 (S.D.N.Y. 1970).[39]

The district court and court of appeals both independently determined that a clear or strong factual showing of inadequate representation had not been made by petitioner and intervention was accordingly denied. Furthermore, the district court found that it was neither necessary nor appropriate to hear the live testimony of any particular witness which any party offered to call in an evidentiary hearing. (App. C.

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[38] See 7 A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 528 (1972). *See also* United States v. International Business Machines Corp., 62 F.R.D. 530, 532 n.1 (S.D. N.Y. 1974). The other cases relied upon by the petitioner for its argument that only a minimal burden of inadequate representation need be shown are also irrelevant to the particular issue which confronted the courts below. Such cases dealt with intervention in cases where the representative was a private party and for the reasons stated herein are clearly distinguishable from intervention in a government antitrust proceeding. (Pet. 26),

[39] Professors Wright and Miller have likewise recognized that, in these circumstances, inadequate representation must be demonstrated by a "concrete," "very strong" or "very compelling" showing. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 528, 529, 531 (1972).

19a) This was to a large extent based on the fact that the data proferred by NFO to support its request for a hearing "was either uncontroverted or clearly irrelevant and immaterial to any issue before the Court."[40] This Court does "not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), nor is jurisdiction "conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923). Therefore, the petition should be denied.

III. Recent Legislation Has Diminished the Importance of the Issue Here Involved

On December 21, 1974, the Antitrust Procedures and Penalties Act was signed by the President and enacted into law. Section 2 of the new Act relating to consent decrees negotiated with the government was passed to assure the "integrity of and public confidence in procedures relating to settlements via consent decree procedures" and was designed to "substitute 'sunlight' for 'twilight'" in the Justice Department's decision to enter into a proposal for a consent decree. H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. (1974), at 6. As a result of this new legislation, interested persons, although not formally made parties to the proceeding, are given the opportunity to intensively examine the legal and factual reasoning behind the consent decree proposal and thereafter respond affirmatively or negatively to such proposal. Since these new procedures will serve to heighten public awareness of and partici-

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[40] See also App. C. 26a, 30a, 36a. This finding was affirmed by the court of appeals. (App. A. 11a)

pation in the government's consent decree proceedings, there is no need for the Court to expand or even re-examine the heretofore well-settled standards for allowing intervention in such situations.

A brief summary of the relevant provisions of the APPA illustrates the increased degree of participation. Initially, at the time of filing the proposal, the United States must file with the court, publish in the Federal Register, and supply to any person who requests it, a "competitive impact statement." This statement includes a description of the acts and practices complained of, explanation of the proposed relief and its anticipated effects on competition, remedies available to other persons including procedures for modification of the judgment, and an evaluation of alternatives considered but rejected. Section 2(b).[41] Interested persons are then given an opportunity to comment upon the proposal for a consent judgment and the supporting materials and the United States must then publicly respond to such comments. Section 2(d). On the basis of this material, as well as full or limited participation in the proceedings by interested persons if desired by the court, the district court judge is to determine whether the entry of the decree is in the public interest.

Given the availability of these procedures by which any member of the public can be informed of and participate in proceedings leading to the approval or disapproval of a proposed consent judgment, the importance of propounding any further standards for

[41] A summary of this material as well as a list of determinative documentary material must also be published for a specified period of time in general news publications. Section 2(c).

intervention in cases brought by the United States has been vastly diminished. Whereas previously the sole legislatively recognized avenue for public participation was through intervention,[42] Congress has now formally granted parties additional means by which they can make a significant contribution to the consideration of a consent decree by the court but yet not disrupt or confuse the judicial proceedings, *e.g.*, comments to competitive impact statements and to government responses to third-party inquiries. Thus, under the APPA, without intervention, an interested person is still guaranteed a considerable ability to bring before the court reasons and information relating to whether the proposed decree should be approved.

Moreover, the APPA has diminished the importance of the questions presented in the petition by Congress' express approval of past judicial opinions relating to intervention in government antitrust consent decree proceedings. All of the relevant precedent had been established at the time of the enactment of this legislation and if Congress thought that expansion or clarification of the right to intervene was needed in these cases, it had a perfect opportunity to do so. Instead, Senator Tunney, who was a major proponent of the bill, stated that

> [p]rovision 2(f)(3), which provides that a court may authorize participation in its proceedings upon a proposed consent decree by interested persons or agencies, is not intended to broaden the

[42] Courts have also received input in evaluating proposed consent decrees from third parties participating in an *amicus curiae* status. *See, e.g.*, United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970).

existing right of intervention. 119 Cong. Rec. S13928 (daily ed., 7/18/73).[43]

Therefore, it is clear that Congress was well aware of the state of the law in these circumstances and specifically declined to alter it.

The petition is replete with attempts to expand intervention by reliance upon the APPA. (Pet. 34, 38) These arguments were made to Congress when it was considering the legislation and were rejected.[44] In this context, where there is no conflict in the courts as to the standards for intervention and where Congress has definitively established that these standards are appropriate and are to remain the same, the petition raises no issue of public importance but rather seeks a rehearing of solely a private controversy. In the words of Mr. Chief Justice Taft:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a

[43] Senator Tunney also stated that the APPA, although insuring meaningful comment, would not have altered the outcome of United States v. International Telephone and Telegraph Corp., 349 F.Supp 22 (D. Conn. 1972), *aff'd per curiam sub nom.*, Nader v. United States 410 U.S. 919 (1973) and United States v. International Telephone and Telegraph Corp., 1974 Trade Cases ¶ 74,872 (D. Conn. 1974). *See* Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess. (1973), at 2. Cf. H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. (1974), at 9.

[44] *See, e.g.*, remarks of Worth Rowley, Esquire, Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess. (1973), at 141: "[The statute] does and should . . . increase the rights of intervenors."

> real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)

The petition for writ of certiorari should accordingly be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 8, 1976

No. 76-238

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE NATIONAL FARMERS' ORGANIZATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
ASSOCIATED MILK PRODUCERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Cases:

Page

Cases:

Statutes and rules:

Federal Rules of Civil Procedure:

Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a), as modified upon the denial of rehearing (Pet. App. 12a), is reported at 534 F. 2d 113. The memorandum and order of the district court (Pet. App. 13a-43a) are reported at 394 F. Supp. 29.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1976. A timely petition for rehearing was denied on May 19, 1976, and the petition for a writ of certiorari was filed on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly denied a private party intervention as of right in a government antitrust suit, in order to oppose settlement of the case by a consent judgment, when the court found that there was no evidence of impropriety or of failure by the government adequately to represent the public interest, and the private party had a full and fair opportunity to present its objections.

STATUTE AND RULE INVOLVED

Section 2 of the Antitrust Procedures and Penalties Act, Pub. L. 93-528, 88 Stat. 1706, 15 U.S.C. (Supp. V) 16, is set forth at Pet. App. 69a-73a. Rule 24 (a)(2), Fed. R. Civ. P., is set forth at Pet. App. 68a.

STATEMENT

On February 1, 1972, the United States filed a civil antitrust suit against Associated Milk Producers, Inc. ("AMPI"), an agricultural cooperative marketing association. The complaint charged that AMPI had violated Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, by conspiring to restrain and by monopolizing the production and sale of milk. The parties subsequently engaged in extensive pretrial proceedings (Pet. App. 2a).

In January, 1974, the parties began serious settlement negotiations, and on August 13, 1974, they presented a proposed consent decree to the district court. The district court ordered an extensive series of procedures designed to provide it with sufficient information to determine whether the consent decree would serve the public interest, including the solicitation of comments from interested persons and groups (Pet. App. 16a-17a).

Petitioner, National Farmers Organization ("NFO"), was among those responding. NFO is an organization composed of farmers; it competes with AMPI and is conducting private antitrust litigation against AMPI.[1] It filed extensive comments with the district court, urging that no consent decree be entered, and that in any event the proposed decree was too lenient.

The United States filed a 99-page response to the questions and comments received, in which it explained its reasons for agreeing to the decree (Pet. App. 17a). The response correlated each violation charged in the complaint with sections of the proposed decree designed to remedy the violations, and it explained why dissolution or divestiture of AMPI was not in the public interest (Pet. App. 44a-46a).[2] The government also made available the massive economic study on which it based its analysis (Pet. App. 20a).

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[1] *Alexander* v. *National Farmers Organization*, W.D. Mo., Civ. No. 19191-1. A judgment in the government suit that AMPI had violated the Sherman Act would, under Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. (Supp. V) 16(a), be entitled to *prima facie* effect in NFO's private action.

[2] The response noted the unusual legal context of the suit: AMPI is an agricultural producers' cooperative, and the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291-292, exempts from the Sherman Act the joining together of dairy farmers to carry out the objectives of "processing, preparing for market, handling and marketing" so long as they refrain from predatory practices. It pointed out that, as a cooperative, AMPI's market power is dependent upon membership, not ownership of capital, and that a member may leave AMPI and sell his milk in competition with AMPI through another cooperative or directly to a producer. The response stated that since the chief vice of AMPI's conduct was that by a variety of predatory practices it blocked this competition for markets, the judgment, by specifically outlawing these practices, is calculated to dissipate AMPI's monopoly power and return the industry to a competitive footing. J.A. 262-264. ("J.A." refers to the appendix filed in the court of appeals.)

On October 28, 1974, NFO, alleging that the United States had failed adequately to represent the public interest, moved to intervene.[3] Relying on the Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. (1974) ("Watergate Report"), NFO claimed that the Justice Department's handling of the suit has been compromised by AMPI's alleged attempts to thwart filing of the suit. Pressed by the district court for specifics, NFO admitted the good faith and honesty of the government personnel who negotiated and proposed the decree[4], but it repeated its contention that the Watergate Report was "a sufficient showing of corrupting influence at work * * * [to justify its] intervention * * * " (Pet. App. 23a-24a). NFO requested an evidentiary hearing on its charges. The district court on November 14, 1974, directed NFO to outline the proof it would adduce at a hearing, to which NFO on November 22, 1974, replied:

> In view of the Court's judicial notice of the Final Report of the Senate Watergate Committee * * * NFO does not propose to adduce additional proof on this issue * * * [J.A. 625].

The court deferred ruling on NFO's motion for intervention pending consideration of the consent decree.

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[3]NFO moved for intervention of right under Rule 24(a)(2), Fed. R. Civ. P., and for permissive intervention under Rule 24(b), Fed. R. Civ. P. The petition does not challenge the denial of permissive intervention (Pet. 5, n. 5).

[4]Petitioner's counsel also conceded the good faith and integrity of "the people within the Antitrust Division whom I know" (Pet. App. 23a). At the same time, another proposed intervenor, Sentry Foods, informed the court that "we have no evidence whatsoever that would lead us to believe that there is any corruption at work in the formulation of this settlement" (Pet. App. 23a, n. 7).

On December 21, 1974, the Antitrust Procedures and Penalties Act[5] became law. Section 2 of the Act establishes procedures for the approval of consent decrees in government antitrust litigation. The court asked the parties to comment on the applicability of the Act to the pending proceedings. The United States replied that the procedures already ordered by the court substantially complied with the requirements of Sections 2(b)—2(d) of the Act. However, it argued that AMPI should be required to comply with Section 2(g), which obliges the defendant to disclose certain lobbying contacts concerning or relevant to the proposed consent decree. AMPI maintained that the new Act did not apply to pending proceedings, but, without waiving its position, it filed a statement in response to a request of the court covering the period during which the consent decree was negotiated.

The United States also responded to an informal request of the court by submitting a brief additional list of AMPI contacts with the Antitrust Division between the filing date of the suit and the start of the settlement negotiations. AMPI later filed its own list of contacts covering that period. After NFO objected to AMPI's filings, the government informed the district court that to the best of its knowledge the material filed by AMPI was neither false nor deceptive (Pet. App. 21a-22a; 27a-29a).

The district court held that entry of the consent decree would be in the public interest, and denied NFO's motion to intervene (Pet. App. 13a-43a). The court ruled that NFO was not entitled to intervene as of right under Rule 24(a) because it had not made the showing for intervention required by *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, that the government had defaulted in its

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[5]Pub. L. 93-528, 88 Stat. 1706, 15 U.S.C. (Supp. V) 16.

representation of the public interest by bad faith or malfeasance in settling the case (Pet. App. 32a-33a; 36a). It rejected as unfounded NFO's contention that "corruption was at work in the formulation of the consent decree proposed in this case" (Pet. App. 26a).

Specifically, the court found that the government attorneys who had negotiated and proposed the decree had not been influenced by outside political pressure and had done their work in good faith without malfeasance (Pet. App. 30a). It further noted that NFO, though invited by the court, had failed to produce or promise to produce any evidence of official impropriety beyond that contained in the Watergate Report. The court ruled that that evidence in no way related to the government personnel who formulated the consent decree (Pet. App. 26a, 30a). Because of the insufficiency of NFO's showing, it denied the request for an evidentiary hearing on these matters (Pet. App. 30a).

On NFO's appeal, the court of appeals unanimously affirmed (Pet. App. 1a-11a). The court held that under *Sam Fox*, *supra*, a party seeking to intervene in consent decree proceedings to represent the public interest in competition must show bad faith or malfeasance by the government (Pet. App. 9a). The court agreed with the district court that "the government had acted in good faith." It noted that NFO did not question the integrity (Pet. App. 10a) and good faith of the lawyers who participated in hearings on the degree, and that it had submitted voluminous material on the government's conduct (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct; it does not conflict with any decision of this Court or of any other circuit; and it does not warrant review by this Court.

1. Petitioner's principal claim is that the court of appeals misapplied the dictum in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689, that a private party cannot intervene as of right to challenge the government's settlement of an antitrust suit by a consent judgment "at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." It contends that the court has conditioned such intervention upon the private party making a "conclusive showing" of government bad faith or malfeasance in settling the case (Pet. 34-35).

The two courts below, however, neither stated nor implied that a conclusive showing was necessary. Fairly read, the opinions of the court of appeals and district court hold that NFO had not made even a *prima facie* showing of government bad faith or malfeasance in settling the case.

This Court has long recognized that in federal antitrust litigation it is the United States "which must alone speak for the public interest." *Buckeye Coal & Railway Co.* v. *Hocking Valley Railway Co.*, 269 U.S. 42, 49.[6] Disagreement over the wisdom of the government's settlement of an antitrust suit, such as that petitioner expresses, does not indicate inadequate government representation of the public interest and is not ground for private intervention. *United States* v. *Blue Chip*

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[6]To the extent that petitioner's interest was its own advancement (especially the aiding of its private treble damage suit) rather than the general public interest in competition, this was a private interest which it can pursue in private litigation and which does not justify intervention in a government antitrust suit. *United States* v. *Blue Chip Stamp Co.*, *supra*; *United States* v. *Automobile Manufacturers Association*, 307 F. Supp. 617 (C.D. Cal.), affirmed *sub nom. City of New York* v. *United States*, 397 U.S. 248.

Stamp Co., 272 F. Supp. 432 (C.D. Cal.), affirmed *per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *United States* v. *International Telephone & Telegraph Corp.*, 349 F. Supp. 22 (D. Conn.), affirmed *per curiam sub nom. Nader* v. *United States*, 410 U.S. 919.

Assuming, without conceding, that the dictum in *Sam Fox, supra*, 366 U.S. at 689, permits intervention where the third party makes a "claim of bad faith or malfeasance on the part of the Government" in settling the case,[7] more than a mere conclusory allegation of bad faith or malfeasance is required.[8] The party must support his charges with proof at least sufficient to constitute a threshold, or *prima facie* showing that there was improper conduct in settlement of the case. The two courts below correctly held that NFO made no such showing.

NFO itself admitted that the Antitrust Division attorneys who negotiated the decree (and other Antitrust Division personnel whom its counsel knows) acted in good faith

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[7]Another exception is where the government, or district court, has ignored the mandate of this Court. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136; *United States* v. *Blue Chip Stamp Co.*, *supra*; *United States* v. *Western Electric Co.*, 1968 Trade Cases, para. 72,415 (D. N.J.), affirmed *per curiam sub nom. Clark Walter & Sons, Inc.* v. *United States*, 392 U.S. 659; *United States* v. *Automobile Manufacturers Association*, *supra*; *United States* v. *Paramount Pictures Inc.*, 333 F. Supp. 1100 (S.D. N.Y.), affirmed *per curiam sub nom. Syufy Enterprises* v. *United States*, 404 U.S. 802. There is no question in this case of conformity to the mandate of this or any other appellate court.

[8]Petitioner apparently recognizes this, since it states: "Intervention, if it is to be meaningful, obviously cannot be made to turn upon the success of the ultimate claim; something less in the way of a preliminary showing must be recognized as sufficient" (Pet. 35).

and without malfeasance (Pet. App. 23a). Nonetheless it speculates that "unnamed high government officials may have influenced the subsequent consent decree proceedings * * *" (Pet. App. 9a). The district court invited NFO to submit evidence to support this charge; NFO submitted only the Watergate Report (Pet. App. 25a).

The district court after careful examination of that Report, which deals with actions by AMPI and the government in 1971 and 1972, rightly concluded that the Report provided no basis for connecting those events with the settlement of the case some years later (Pet. App. 30a). Indeed, the Watergate Report, to the extent that it is relevant at all, tends to support the government's good faith, for it describes the government's prosecution of the case, once started, as "vigorous." See S. Rep. No. 981, *supra*, at 733, n. 83; 729, n. 57.[9] The district court correctly concluded that there was insufficient showing to justify intervention or further inquiry by evidentiary hearing as NFO requested (Pet. App. 30a).[10] The court of appeals agreed (Pet. App. 9a-10a), and there is no reason for this Court further to review this factual issue.[11]

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[9]The court also considered the lists of AMPI contacts supplied by the United States and AMPI, and found them not to show wrongdoing in settlement of the case (Pet. App. 26a; 30a). NFO cites what it calls "an unusual telephone call" from the White House to the Antitrust Division in 1973 (Pet. 14), but ignores the facts that the call took place months before the start of settlement negotiations, and that Deputy Assistant Attorney General Wilson rebuffed the caller (J.A. 686-687).

[10]Petitioner complains about the lack of an evidentiary hearing (Pet. 38-39), but since petitioner did not outline any evidence it proposed to submit in support of its contention of impropriety in settling the case, the court acted within its discretion in not holding a hearing.

[11]Since the court of appeals did not require a "conclusive showing" of government malfeasance or bad faith, petitioner's contention (Pet. 35-36) that such a standard would be inconsistent with *Trbovich* v. *United Mine Workers*, 404 U.S. 528, is irrelevant.

2. Petitioner suggests that even if it failed to meet the established standards for intervention, the Antitrust Procedures and Penalties Act enlarged the scope of intervention as of right in government antitrust suits (Pet. 32a-34a). However, as petitioner states, "[a]dmittedly, the Act does not directly address intervention and adequacy of representation * * *" (Pet. 32).

Section 2(e) of the Act requires the district court to determine that the entry of a consent decree is in the public interest. Section 2(f) provides that in making its Section 2(e) determination the court "may" employ various methods of obtaining information about the proposed decree, one of which is to allow intervention "pursuant to the Federal Rules of Civil Procedure" (Section 2(f)(3)). Petitioner correctly notes that "the Act does not confer upon third parties any right to intervene * * *" (Pet. 38). The Act leaves it to the discretion of the district court to select the appropriate procedures.

The legislative history confirms that the purpose of the procedures listed is to aid the district court in compiling information, and that the court is to decide which procedures are necessary for that purpose. Congress expected that the district court would "adduce the necessary information through the least complicated and least time-consuming means possible." H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974) quoting with approval S. Rep. No. 298, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 24598-24599 (1973) (statement of sponsor Sen. Tunney). There was no intent to enlarge the right of a private party to intervene. 119 Cong. Rec. 24599 (1973) (Sen. Tunney). After an extensive analysis, the district court in this case correctly concluded that intervention was not necessary

to provide the information required to determine whether the decree was in the public interest.[12]

3. Finally, in a brief "synthesis" of its petition NFO contends that the settlement of the case lacks the "appearance of justice" (Pet. 39-40). The district court and the court of appeals found after careful scrutiny that the decree is in the public interest and that the government acted properly in entering into the decree. In the face of these findings by the two courts below, it is evident that both justice and the appearance of justice were satisfied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1976.

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[12]Petitioner's assertion (Pet. 34) that the United States "collaborated" with AMPI "to nullify" AMPI's compliance with Section 2(g) of the Act is erroneous. In fact, the United States over AMPI's objection urged that AMPI be required to comply with that section. Although the statute speaks only to defendants and places no duty on the government to vouch for a defendant's filing, the government cooperated fully with the district court's request for information, and informed the court that to the best of its knowledge the submission of contacts made by AMPI was neither false nor deceptive (Pet. App. 21a-22a; 25a-29a).

DOJ-1976-10

IN THE

Supreme Court of the United States

October Term 1976

No. 76-238

THE NATIONAL FARMERS' ORGANIZATION, INC.
Petitioner,

v.

UNITED STATES OF AMERICA AND ASSOCIATED MILK PRODUCERS, INC.
Respondents.

REPLY BRIEF OF NATIONAL FARMERS' ORGANIZATION, INC. ("NFO") IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

We presented two basic questions in our certiorari petition. We have tried to structure this Reply accordingly by grouping the points made by the Government and AMPI in their oppositions under the question to which they appear to relate. The grouping, however, necessarily has been somewhat arbitrary because many of their points do not really have anything to do with the questions presented in our Petition. They amount rather to an assumption that a bad faith standard is

controlling, joined with a plea on the merits—which this Court is asked to take on faith—that neither the Government nor AMPI is guilty of any wrongdoing.

ARGUMENT

I. The Need for Clarification of the Standard by Which the Adequacy of the Government's Representation Is To Be Judged.

We have urged that, primarily as a result of this Court's treatment of the issue in *Sam Fox Pub. Co.* v. *United States,* 366 U.S. 683 (1961), and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), and in its per curiam affirmances of divergent district court decisions, "there is still nothing even approaching a workable, authoritative standard by which adequacy can be measured." *See* Petition at 28-32. We have also urged, as a necessary concomitant, that the standard applied by the court of appeals requiring one seeking intervention to show that the Government acted in bad faith in negotiating and accepting the decree is illusory and unworkable, confuses the procedural question of intervention with the substantive question of approval of the decree, and would effectively preclude intervention in consent decree proceedings. *See* Petition at 34-35.

The Government begins by urging that the court of appeals did not require a prospective intervener to prove[1] that the Government had settled the case in

[1] The Government purports to see some significance—without explaining what it is—in the Petition's characterization of the court of appeals as having required a "conclusive showing" of bad faith. *See, e.g.,* Government Brief at 7. At the risk of belaboring the obvious, the phrase "conclusive showing" as used in the Petition is intended to refer to the court's holding that an intervener must prove or show bad faith (i.e., establish it to the satisfaction of the district court) as opposed merely to claiming or making a "threshold" or "prima facie" showing. In line with this, the Petition also characterizes the standard applied below as requiring an "affirmative showing" (at 20), "proof of bad faith" (at 26), "proof of wrongdoing" (at 35), and "proof that the Government acted corruptly" (at 35).

bad faith. "Fairly read," says the Government, the opinion required only a "prima facie" showing of bad faith. Government Brief at 7-8. AMPI, we note, reads the lower court opinions as requiring a "clear showing." AMPI Brief at 30.

The Government's position suffers, we submit, from the confusion that permeates the adequacy of representation issue. To begin with, it is not clear whether the Government is arguing that a prima facie showing of bad faith would entitle one to intervention, or merely to discovery and an evidentiary hearing at which the applicant would still have to convince the district court that the decree in fact was negotiated and accepted in bad faith. The Government also is unclear whether the showing to which it refers is a "prima facie" one or merely "a threshold" showing, referring to it both ways. *See* Government Brief at 8. And finally, whatever the correct interpretation(s) of the Government's position, it is proffered to this Court with a string on it in the form of an "assuming without conceding" caveat. *See* Government Brief at 8.

Of course, the notion of a prima facie or threshold showing is the Government's invention. It is not the standard applied by the court of appeals and does not appear in that court's opinion. *See* App. A. The court of appeals held, quite simply, that bad faith on the part of the Government "must be shown before intervention will be allowed." App. A at 9a. The Government apparently recognizes that this holding is in-

defensible for the reasons outlined in our Petition (at 34-35), and has felt compelled to modify the court's opinion. This in itself is persuasive evidence of the prevailing uncertainty and need for authoritative clarification and guidance from this Court.

The Government's argument about a prima facie or threshold showing also begs the question. The Government assumes a "bad faith" standard when selection of the appropriate standard is the very point at issue, and goes immediately to a discussion of how strong the showing must be.[2]

Both the Government and AMPI provide additional support for the Petition in their treatment of this Court's decisions. The Government, for example, concedes that *Cascade* is inconsistent with the bad faith standard supposedly mandated by the *Sam Fox* dictum, but seeks to rationalize it as "another exception." Government Brief at 8 n.7. AMPI's convolutions are even more revealing, as well as entertaining. They begin with the discovery that *Cascade* "did serve to clarify the standard for intervention." AMPI Brief at 21.[3] Alas, this discovery, which is worthy of a Columbus, turns out to be illusory, because AMPI quickly shifts

[2] The bulk of AMPI's argument also amounts to a brief on the merits in favor of a rule precluding intervention. *See, e.g.,* AMPI Brief at 18-21. AMPI posits an illusory and imaginary alternative of permitting intervention of right to anyone who disagrees with the terms of the decree. *Id.* at 19, 20.

[3] After spending almost three pages in a vain attempt to demonstrate this alleged "clarification," AMPI is reduced to urging an ultra vires standard. This is both different from the standard allegedly found in the *Sam Fox* dictum and meaningless as a practical matter, particularly since AMPI equates ultra vires with "outrageous conduct" and "failing to perform its [the Government's] discretionary duty." *See* AMPI Brief at 21 n.25.

to describing *Cascade* as "sui generis" and "limited to the distinct factual circumstances presented by that case." AMPI Brief at 17 n.20, 22.

Both the Government and AMPI further concede that the bad faith standard employed below is at odds with this Court's unanimous decision in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972). The Government tries to ignore the conflict:

> Since the Court of Appeals did not require a "conclusive showing" of government malfeasance or bad faith, petitioner's contention (Pet. 35-36) that such a standard would be inconsistent with *Trbovich* . . . is irrelevant. Government Brief at 9 n.11.

With all respect, this won't do. The basic inconsistency lies in the standard being applied, and not merely in the showing required to meet it. Of course, the decisions are in conflict with respect to the latter element as well. The court of appeals required that bad faith "must be shown" in order to obtain intervention (App. A at 9a), while *Trbovich* required a prospective intervener to show merely that the Government's representation "may be" inadequate, and emphasized that "the burden of making that showing should be treated as minimal." (404 U.S. at 538 n.10)

AMPI has a stab at distinguishing *Trbovich* on the ground that the antitrust laws give a private right of action while the Labor-Management Reporting and Disclosure Act involved in *Trbovich* did not. AMPI Brief at 28-29.[4] It is questionable which way the distinction cuts. The failure of Congress to provide a pri-

[4] This argument is addressed to how the present case should be decided, not to whether review should be granted.

vate right of action arguably indicates less concern for the private interest and a conscious decision to leave the matter entirely to the Government. And even if valid, the distinction would not suggest a different "standard" for intervention, but only a different factor to be weighed in deciding what constitutes "adequate representation."

AMPI also urges that certiorari should be denied because the decision below is the first by a court of appeals on the intervention issue. AMPI Brief at 25. AMPI's argument might have merit if the Petition presented a question of first impression. But it does not. This Court already has dealt with the matter in *Cascade, Sam Fox,* and a series of per curiam affirmances of divergent district court decisions, and the Court's certiorari jurisdiction is invoked on the basis of "the need for clarfying the implications of" this Court's decisions. *S.E.C.* v. *United Benefit Life Ins. Co.,* 387 U.S. 202, 207 (1967). Further handling in the courts of appeal will contribute nothing to resolution of the question because those courts will not approach intervention as a matter calling for their independent analysis, but rather as merely a matter of divining the meaning of this Court's decisions. That is precisely the way that the court of appeals dealt with the matter in this case.

AMPI also urges that the Antitrust Procedures and Penalties Act ("APPA") "has diminished the importance of the [intervention] issue" because the Act's procedures "will serve to heighten public awareness of and participation in the Government's consent decree proceedings." AMPI Brief at 31, 32. We submit that AMPI has it backwards. The increased public

awareness and participation to which AMPI refers surely will result in greater efforts at intervention because it is only through intervention that one obtains full standing and participation at the district court level and the right to seek appellate review. Indeed, without intervention in this case, the very reforms mandated by the APPA will go by the board because the only party interested in appellate review will have no standing to obtain it. *See, e.g.,* Petition 33-34.[5]

AMPI's argument that the Act's consent decree provisions are not applicable to this case (AMPI Brief at 12-13 & n.15) has nothing to do with the issues raised by NFO's certiorari petition.[6] The Act is relevant to these issues in two ways. First, its passage increases the importance of the intervention issue, as we just pointed out. This is true regardless of the Act's applicability to this case. Second, we have pointed to the Government's passive attitude toward implementation of the Act's reforms, particularly the requirement that a defendant reveal fully its political contacts relating to the case. *See* Petition at 8, 15-18.[7] The relevance of

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[5] We have not contended that the APPA "enlarged the scope of intervention as of right." Government Brief at 10. We have urged that the APPA was the product of Congressional concern about the Government's conduct in negotiating consent decrees, and intensified the significance of the intervention issue. We have also noted that an intervener may be the only one with an adversary interest in seeing that the APPA reforms are implemented and in pursuing the matter on appeal, a situation reflected in the record of this case. *See* Petition at 33-34, 38, 40.

[6] Of course, the substantive APPA issues (Petition at 19-20, 21-24) would have to be faced by the lower courts if intervention ultimately were granted under an appropriate standard.

[7] Even in this Court, the Government continues to assert its indifference to enforcement of § 2(g) of the Act. *See* Government Brief at 11 n.12 (the Act "places no duty on the government to vouch for a defendant's filing").

this passivity to the adequacy of the Government's representation does not depend upon the strict applicability of the Act, particularly since the Government has conceded that the Act is applicable and hence is an appropriate yardstick for measuring the quality of its representation.

AMPI's contention is frivolous in any event. Section 7 of the Act specifically provides that the revisions in the Expediting Act contained in § 3 do not apply "to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act."[8] In other words, the question of pending cases was specifically considered by Congress and a clearly defined and very limited exemption was spelled out. The proposed amendment (H.R. 9947) that AMPI says "would have specifically provided retroactive effect" (AMPI Brief at 13 n.15) in fact proceeded on the explicit understanding that the consent decree provisions already would apply to any case in which the decree had not become final prior to enactment. The amendment would have made these provisions also applicable to certain decrees entered "before the date of enactment of" the bill. *See* Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, 93d Cong., First Sess. at 14, 46-48 (1973) (hereafter "House Hearings"). Finally, the decree in question was twice amended by the parties *after* enactment. R. at 679, 682.[9]

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[8] 88 Stat. 1706, 1710 (1974) 15 U.S.C. § 29 note (Supp. I 1976).

[9] Even under general principles of law, a remedial statute such as that here is deemed applicable to pending cases. *See, e.g., Bradley* v. *School Board*, 416 U.S. 696 (1974).

Both the Government and AMPI also seek to justify the failure to provide for the structural relief (*i.e.*, dissolution or divestiture) that is normal in monopolization cases. Government Brief at 3 & n.2; AMPI Brief at 27-28. Their arguments, however, have nothing to do with the need for clarification of the standard for intervention or even the selection of the appropriate standard. As we have pointed out (*e.g.*, Petition at 26-27), intervention is a preliminary procedural matter that cannot be made to turn on the substantive issue of approval of the decree. The failure to seek structural relief was merely one of the circumstances on which NFO relied to demonstrate the inadequacy of the Government's representation, a circumstance that would have to be evaluated under a proper standard. It is highly significant, in this connection, that the Government recognizes that the omission was unusual and requires justification.

AMPI makes a pass at arguing that the lower courts found that NFO had not satisfied the "interest" and "impairment" requirements of Rule 24(a)(2). AMPI Brief at 10-11. The Government, on the other hand, recognizes that neither of the lower courts so held. *See* Government Brief at 5-6. The court of appeals, whose judgment the petition seeks to bring before this Court for review, predicated its decision squarely upon the bad faith and adequacy of representation ground.[10]

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[10] As the court of appeals pointed out (App. A at 7a), the district court also based its denial of intervention on the bad faith rule derived from the *Sam Fox* dictum, and there is nothing to the contrary in the portions of the district court's opinion cited by AMPI (App. C at 36a, 40a). Indeed, there never was any legitimate issue about either the "interest" of NFO and its members or the practical impairment or impediment in their ability to protect that interest

In a similar diversion, AMPI says that NFO objected to the entry of "any" decree because it wished to have the benefit, in its private action, of a litigated judgment in the Government case. AMPI Brief at 8. The Government, less intrepid than AMPI, merely hints at the same point. *See* Government Brief at 7 n.6. AMPI's complaint, we submit, has nothing to do with the present Petition, but it does serve to underscore the dilemma faced by an applicant for intervention. Should an applicant have a personal interest and a private right of action, that is used, as here, to taint his intervention. But should he assert no personal interest and private claim, he is denied intervention. *See United States* v. *International Tel. & Tel. Corp.*, 349 F. Supp. 22, 26-27 (D. Conn. 1972), *aff'd per curiam sub nom. Nader* v. *United States*, 410 U.S. 919 (1973).

II. The Requirement of Discovery and an Evidentiary Hearing.

Should this Court ultimately decide that the bad faith standard applied by the court of appeals is the correct one, we have urged (Petition at 38-39) that the Court should clarify the extent to which an applicant for intervention is entitled to discovery and an evidentiary hearing in his attempt to satisfy such a stringent standard. The only portion of the Government's brief even remotely relevant to this question is the attempt to read into the opinion of the court of appeals a requirement that a prospective intervener need make only a "threshold" or "prima facie" showing of bad faith. We already have noted the ambigu-

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that might result from the entry of the decree. *See* Petition at 6-7. *See also Sam Fox Pub. Co.* v. *United States*, 366 U.S. 683, 694 (1961); Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties*, 123 U.Pa. L. Rev. 822, 883-84 (1975).

ities in the Government's position, including whether the point is intended to relate to the standard for intervention or to the standard for granting discovery and an evidentiary hearing. *See* pp. 2-3, *supra*.

Assuming arguendo that the point relates to the hearing standard, the rule is the invention of the Government. The court of appeals never discussed the hearing issue; much less did it lay down a prima facie or threshold rule for its resolution. This omission was even raised in NFO's "Petition for Rehearing" (at 8-11), but the court again rejected it without comment even though it amended its opinion in another respect in response to the rehearing petition. *See* App. B at 12a. If the Government is indeed espousing a prima facie or threshold rule,[11] it is impliedly conceding both the error of the court of appeals and the need for clarification and guidance from this Court.

The main burden of the opposing briefs is really an effort to finesse the need for clarification of the hearing standard by suggesting that, on one pretense or another, a hearing is not required or would be unproductive in this case. We can only conclude that the Government and AMPI have taken this course because of their acute concern about the gap in the record stemming from the denial of a hearing. And, in fact, their points serve to underscore the importance of discovery and a hearing if a bad faith standard is to be employed. For example:

1. The Government and AMPI place their principal reliance upon an alleged admission by NFO regard-

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[11] The Government's approach would seem to call for a showing considerably stronger than the courts have required in the analogous situations cited at p. 39 of our Petition.

ing the integrity of certain of the Government's attorneys. In so doing, they seriously distort the record. The Government, for example, asserts that:

> . . . NFO admitted the good faith and honesty of the Government personnel who negotiated and proposed the decree. . . . Government Brief at 4.

With slight changes in phraseology, the Government makes this point several times. *E.g.*, Government Brief at 6, 8-9. AMPI, with its customary abandon, makes the point in even stronger terms. *E.g.*, AMPI Brief at 6, 17, 26.

Such an admission, had it been made, would be critical only if we assume the very point at issue—*i.e.*, that adequacy of representation under Rule 24 is to be judged by a "bad faith" standard. If the standard is otherwise, as we submit it should be, the point is of evidentiary value at most.

NFO, however, made no such "admission," as both the Government and AMPI know. The statement that they cite was strictly limited to the trial staff of the Antitrust Division, as the court of appeals recognized. *See* App. A at 9a. Indeed, when the district court had inquired whether NFO was claiming "bad faith or malfeasance within the meaning suggested in *Sam Fox Publishing Company*" (R. at 480), counsel for NFO responded:

> . . . Our brief does not purport to confer any absolution upon the Department of Justice for its conduct in this case. *We do believe that this Consent Decree may well represent the slap on the wrist for which AMPI bargained corruptly with the Government of the United States, and that is our position and we intend to adhere to it, and if*

> *given an opportunity for a full evidentiary hearing we will do our best to prove that point.* R. at 481 (emphasis added).

Declining to attack the integrity of the trial staff is a far cry from conceding the integrity and good faith of the "Government." It is not the trial staff who decides whether and what type of a consent decree will be accepted by the Government.[12] Indeed, in this very case the Government acknowledged that "Antitrust Division personnel in Washington" participated in negotiating the terms of the decree, that "superiors" of the staff approved the decree, and that "personnel of the Department of Agriculture" were consulted on the terms of the decree.[13] R. at 471. And even with respect to the trial staff, we have no way of knowing—since there has never been a hearing—what instructions they received from their superiors regarding negotiations with AMPI over the terms of the decree.[14]

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[12] *See, e.g.*, House Hearings at 201 (testimony of Professor Handler).

[13] A number of AMPI's contacts regarding settlement of the case were with Department of Agriculture personnel. *See* R. at 703-09. In what both the Government and AMPI concede to be a specialized field (Government Brief at 3 n.2; AMPI Brief at 27 n.34), the input of the Department of Agriculture presumably was of more than routine significance.

[14] AMPI's point about NFO's alleged failure to "question" the Government trial attorneys about the terms of the decree suffers from the same infirmities. Moreover, the alleged questioning related not to the intervention motion and the bad faith issue, but to the substantive terms of the decree (R. at 562-63), and consisted of legal argument, not testimony (R. at 569-91). Nor did NFO "decline" even this limited opportunity. After an Amicus had presented its questions about the terms of the decree, the court decided to abandon the "question-and-answer method of proceedings" in favor of written comments. R. at 598-99.

One final point. We have had no discovery or hearing on the bad faith issue, and we cannot say what they would reveal. We only know that the Government, seeking to neutralize the issue, has felt the need to stretch and distort NFO's position. This, we submit, is the most revealing and informative aspect of the Government's argument.

2. The Government also seeks by untested assertion to divorce the corrupt activity of 1971-73 from the consent decree proposed in the summer of 1974. Thus, it refers to "serious settlement negotiations" as having begun in January 1974. Government Brief at 2. Again, it argues that the district court "rightly concluded" that the events recited in the Watergate Report had not been connected with the "settlement of the case some years later." *Id.* at 9. *See also* AMPI Brief at 5-6, 26-28.

The alleged discreteness of the negotiations and the resulting decree does not go to the need for clarification of the standard or even to what the standard should be. It is purely evidentiary, and relevant if, and only if, the standard to be applied is actual misconduct in the formulation and acceptance of the decree. Even then, to consider the point conclusive as a matter of law would make it ridiculously easy to cover-up wrongdoing. A mere hiatus followed by additional cosmetic negotiations would completely mask the wrongdoing.

Of course, the relationship between the decree that surfaced in the summer of 1974 and the earlier agreement to fix the case in return for contributions[15] has

[15] There was concrete evidence in both the Watergate Report and the record of this case that AMPI actually had reached agreement with the Government, represented by Mr. Kalmbach, on a corrupt settlement of the case. *See* Petition at 12-13.

never been explored. We know only that the decree as proposed is suspiciously weak and fails to provide for the usual structural relief. We do not even know how the decree compares with the relief proposed by the Division during the "prefiling negotiations" that took place in January 1972 at the insistence of then Attorney General Mitchell. *See* Petition at 11-12.

AMPI's effort to divorce the decree from its corrupt activities contains a highly revealing and suggestive twist of its own:

> In January 1974, with different counsel representing AMPI, the parties began serious settlement negotiations which were different in character from the earlier talks. (R. 698) It was these later discussions that resulted in the proposed consent decree. . . . AMPI Brief at 5.

This is an amazing example of bootstrapping. The record citation upon which AMPI relies—"R. 698"—is to a letter written by AMPI's counsel in which he makes the same self-serving assertion now made in AMPI's brief.

AMPI's statement is also demonstrably untrue in one respect. AMPI's second statement of political contacts, reluctantly submitted in purported compliance with §2(g) of the APPA, reports (item 7 under the heading "Additional Contacts") that "E. C. Heininger and Sidney Harris" met with a Department of Agriculture attorney on 19 April 1973 to discuss the formulation of "pooling" guidelines "for possible use in drafting a consent decree." R. at 709. "Sidney Harris," we hasten to add, was also lead counsel for AMPI during the settlement negotiations that allegedly "be-

gan" in January 1974, and continues as lead counsel for AMPI in opposing certiorari.[16]

3. The Government next urges that NFO's complaint about the lack of an evidentiary hearing on the "bad faith or malfeasance" issue is without merit because "NFO, though invited by the court, had failed to produce or promise to produce any evidence of official impropriety beyond that contained in the Watergate Report." Government Brief at 6.

The question, however, is not whether NFO could point to "evidence of official impropriety" beyond that already a matter of record. It is whether NFO had made a sufficient preliminary showing to entitle it to discovery and an evidentiary hearing on the point, particularly when the "evidence of official impropriety" is peculiarly within the control of the very parties foisting the decree upon the court and opposing intervention.

The "Catch 22" aspect of the Government's position is illustrated by its treatment of the 1973 telephone call from the President's Special Assistant for Legislative Affairs to the Deputy Assistant Attorney General in the Antitrust Division about AMPI's desire to dispose of the suit through a consent decree. *See* Petition at 14-15. NFO informed the district court of NFO's desire to investigate thoroughly this highly suspect contact (R. at 714, 716), but the district court denied NFO the right to inquire into this or any other matter. The Government argues "that the call took

[16] The spring of 1973, when Mr. Harris was secretly promoting a consent decree on behalf of AMPI, was a time of considerable activity by AMPI directed at the same end. *See, e.g.*, R. at 705, 707, 709.

place months before the start of settlement negotiations, and that Deputy Assistant Attorney General Wilson rebuffed the caller." Government Brief at 9 n.9. Until the contact (and all others) has been fully explored via discovery and an evidentiary hearing, however, there is no way of knowing whether it influenced the decree or whether the call was in fact rebuffed.

Respectfully submitted,

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